Registered No. B. 2.

GENERAL INDEX, TITLE, &c.,

TO THE

INDIAN LAW REPORTS,

BOMBAY SERIES.

Editor.

W. L. Weldon, *Barrister-at-Law.*
H. S. Chatfield, *Barrister-at-Law (Acting).*

Reporters.

Privy Council ... ... J. V. Woodman, *Barrister-at-Law.*

High Court, Bombay... H. S. Chatfield, *Barrister-at-Law.*
Gangaram Bapsoba Rele, *Vakil, High Court.*
Ratanlal Ranchhoddas, *Vakil, High Court.*

VOL. XXXVIII.

1914.

Published under the Authority of the Governor-General in Council,

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AND

THE SUPERINTENDENT OF GOVERNMENT PRINTING, B



THE INDIAN LAW REPORTS,

BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

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JUDGES OF THE HIGH COURT.

Chief Justice.

THE HON. SIR BASIL SCOTT, *Kt.*
" SIR DINSHA D. DAVAR, *Kt.* (*Acting*).

Puisne Judges.

THE HON. SIR S. L. BATCHELOR, *Kt.*
" SIR DINSHA D. DAVAR, *Kt.*
" MR. F. C. O. BEAMAN.
" " J. J. HEATON.
" " N. C. MACLEOD.
" " L. A. SHAH.
" " M. H. W. HAYWARD (*Acting*).

THE HON. MR. T. J. STRANGMAN (*Advocate-General*).
" " M. R. JARDINE (*Acting*).
MR. P. E. PERCIVAL (*Legal Remembrancer*).

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[illegible]

that the adoptive mother was entitled to remain in possession for life and she shared that belief and so remained in possession while the plaintiff took no steps to disturb her.

Held, that the plea of adverse possession by the adoptive mother could not arise, there being no intention to hold adversely so as to acquire an absolute estate.

——————*Lease of land by an agent of landlord—Collection of* [illegible]

[illegible]

lease by the plain[illegible]
and collected the r[illegible]
when the plaintiff's family set up their own title to the land and ceased paying [illegible]

[illegible]

No. 2 —

Held, reversing the decree, that so long as the tenant held the land under the tenancy he held it as the tenant of defendant No. 2's family and their rights [illegible] they were at the beginning, and [illegible] by the reiterated assertions made [illegible] fact that the rents were retained [illegible]

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CIVIL CIRCULARS (1912), CL. 159—*Duty to draw up decree is of the Court.*

See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 97 331

CIVIL COURTS ACT, BOMBAY (XIV OF 1869), SEC 16—*Reference to Assistant Judge—Award not exceeding Rs. 5,000—Appeal to the District Judge—Second appeal to the High Court not maintainable*

See LAND ACQUISITION ACT (I OF 1894), SEC. 54 337

———————————— SEC. 32—*Civil Procedure Code (Act V of 1908) sec 37—Decree—Court of Wards made party after decree—* [illegible] which [illegible] ding [illegible] pro- ceeding.

Gopal Apaji v. *Keshavrao Konherrao* (1913) 38 Bom. 662 *note*, followed.

BANDOO KRISHNA *v.* NARSINGRAO ... ... (1914) 38 Bom. 662

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC 257A—*Decree—Satisfaction—Decree not carrying interest—Mortgage passed in satisfaction of decretal debt made payable in instalments—Interest payable on failure to pay instalments—Covenant for interest can be severed from the covenant as to repayment of principal—Agreement not void so far as concerned principal.*] The plaintiff obtained a decree against the defendant for Rs 800 without interest, but with cost which amounted to Rs 89-12-0. In satisfaction of the decretal debt and in consideration of a cash advance of Rs 10-4-0, the defendant passed a mortgage-deed for Rs 900 in favour of the plaintiff. The amount of Rs 900 was repayable in nine annual instalments of Rs 100 each On failure to pay any one instalment interest was to be charged at the rate of 1¼ per cent per mensem; and the whole amount became payable on failure to pay any two instalments None of the instalments having been paid [illegible] Rs. [illegible] as interest The [illegible] the provisions of section 257 [illegible] but they passed a decree f [illegible] interest was quite distinct and severable from the covenant to pay principal. The defendant having appealed.—

Held, confirming the decree, that the primary and main agreement was to pay a sum of money which was not in excess of the decretal amount, and that it was only on failure to fulfil that agreement that interest was to be charged, that is, it was only something which came into operation when there was a breach of the agreement; and that the primary agreement was therefore not void under section 257A of the Civil Procedure Code, 1882.

Bhagchand v. *Radhakisan* (1903) 28 Bom. 62, followed.

CHATRU *v.* KONDAJI VITHAL ... ... (1913) 38 Bom. 219

———————————— SECS. 268, 278, 283—*Civil Procedure Code (Act V of 1908) Order XXI, Rules 58 and 63—Transfer of Property Act (IV of 1882), sec. 132, illustration (ii)—Decree—Execution—Garnishee - Attachment of debt—Objections by Garnishee unsuccessful—Purchase by judgment-creditor—Suit by purchaser against Garnishee—Garnishee cannot raise the same defence—Suit by Garnishee, period of one year from the date of adverse order—Equity of cross debt—Setting up without payment of Court fee—Garnishee's right of set-off—Prompt decision—Garnishee, trustee for the judgment-debtor.*] A brought a suit against B and in execution of the decree attached a debt alleged to be due to B by T under section 268 of the Civil Procedure Code (Act XIV of 1882). The objection to the attachment having failed A applied

Page

to the attachment,

Held, that the equity arising from the cross debt could be set up by the defendant without payment of Court fee as on a counter claim, that if a cross debt were due to a Garnishee, there should be a right of set-off in his favour.

Held, however, that it was not open to the Garnishee to plead a defence which had already, in an execution inquiry, been unsuccessful, except in a suit instituted within one year from the date of the adverse order, that the property attached could be regarded as property in the possession of the Garnishee in trust for the judgment-debtor, and, therefore could be attached.

Held, further, that a Garnishee's claims and objections should be decided as promptly as other objections to the attachment.

Chidambara Patter v. *Ramasamy Patter* (1903) 27 Mad. 67, followed.

Mussamut Rambutty Koer v. *Kamessur Pershad* (1874) 22 W. R. 26, not followed.

TAYABALLI GULAM HUSEIN *v.* ATMARAM SAKHARAM ... (1914) 38 Bom. 631

CIVIL PROCEDURE CODE (ACT V OF 1908), SECS. 2, 97, ORDER XXVI, RULES 11, 12 (2)—*Dekkhan Agriculturists' Relief Act (XVII of 1879)—Redemption suit—Direction to a Commissioner to take account—The direction not a preliminary decree*] In a redemption suit tried under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the first Court, on the 15th August 1910, referred the taking of the account to a Commissioner and on the 30th August 1910 passed a decree for the plaintiffs for possession free from incumbrances, the defendants having received profits for 25 years after the debt had been paid off.

One of the defendants having appealed on the 10th October 1910, the appellate

the date when the Court issued the commission to the Commissioner on the 15th August 1910 because the issue of commission constituted a preliminary decree within the definition of section 2 of the Civil Procedure Code (Act V of 1908).

The defendant having appealed to the High Court,

Held, reversing the decree of the appellate Court and remanding the case for disposal on the merits, that there was nothing in the Civil Procedure Code

Krishnaji v. *Maruti* (1910) 12 Bom. L. R. 762, explained.

NARAYAN BALKRISHNA *v.* GOPAL JIV GHADI ... (1914) 38 Bom. 392

——— SECS. 4, 100—*Civil Judge at Vinchur—Appeal to High Court.*

See SPECIAL APPEAL 340

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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 60, CL. 2 (*b*)—*Army Act*, 1881, (44 & 45 *Vict.*, c. 58), *secs* 136 *and* 190, *sub-sec* 8, *as amended by Army (Annual) Act*, 1893 (58 & 59 *Vict.*, c. 7), *sec.* 4—*Officer on the Indian Staff*

Messrs K.

t Major D.,

ioiety of that

officer's pay under Order XXI, Rule 48, of the Civil Procedure Code and in

Held, that Major D under section 190, sub-section 8, of the Army Act, 1881, was an Officer of His Majesty's Regular Forces and under section 136 of the Army Act, 1881, and section 60 of the Code of Civil Procedure he was entitled to receive his pay without any deduction and that the attachment must be raised and that the Sheriff must pay to Major D. the sum received by him under the attachment and not yet paid away.

Velchand v. *Bourchier* (1912) 37 Bom 26, applied.

Held, however, that, as the moneys actually paid out to the execution creditors had not been paid out under coercion or under a mistake of fact, though possibly under a mistake of law, Major D was not entitled to a refund of such moneys.

KING KING & CO. *v.* MAJOR DAVIDSON ... ... (1914) 38 Bom. 667

——— SECS 68, 70, RULE 14, ORDER XXI, RULE 101—*Decree—Execution by Collector—Court* functus officio *for the time being—Exhaustion of all the power conferred upon the Collector for execution—Matters requiring to be done in execution must be done by the Court which passed the decree.*] After a decree has been transferred to a Collector for execution, the

Pita v. *Chunilal* (1906) 31 Bom. 207, referred to.

ARJUNA BIN RAGHU *v.* KRISHNAJI ... ... (1914) 38 Bom. 673

——— SEC. 96 (1)—*Reference to Assistant Judge—Award not exceeding Rs.* 5,000—*Appeal to the District Judge—Second appeal to the High Court not maintainable.*

See LAND ACQUISITION ACT (I OF 1894), SEC. 54 337

——— SEC 97—*Preliminary decree—*

nary issues.

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parties were in dispute.

Held, further, that the summons to the defendants should have been for settlement of issues and not for final disposal.

TULJARAM HARICHAND *v.* SITARAM NARAYAN ... (1913) 38 Bom. 377

CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER XXI, RULE 7 (*corresponding to Act XIV of* 1882, *sec.* 225)—*Court of Wards Act* (*Bom. Act I of* 1905), *secs* 31 *and* 32—*Executing Court, power of—Jurisdiction of the Court* ... *Wards Act* ... f the Civil ... to question

Section 32 of the Court of Wards Act (Bom Act I of 1905) was not intended to apply to pending suits. In terms it refers to suits "brought by or against" a Government ward ... which provides that ... left at, the office of ... pending at the time of the assumption of superintendence of the ward's estate by the Court of Wards.

HARI GOVIND *v.* NARSINGRAO KONHERRAO ... (1913) 38 Bom. 194

———— ORDER XXI, RULES 58 AND 63—*Investigation of claims and objections.*

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 268, 278, 283 ... 621

———— ORDER XXIII, RULE 3, SCH II, CLS. 1—16—*Suit—Reference to arbitration without leave of Court—Application to stay further progress of the suit—Application not according to law.*

After the institution ...

the matter in suit within the meaning of Order XXIII, Rule 3 of the Civil Procedure Code (Act V of 1908). On appeal by the defendant the District Judge confirmed the order.

The defendant having applied under the extraordinary jurisdiction,

Held, confirming the order, that where the Court was seized of a cause, its jurisdiction could not be ousted by the private and secret act of parties and if they, after having invoked the ...

1908).

Held further ... rt had perfect liberty to compose ... lawful agreement, compromise or ... had only to apply to the Court ... edure Code (Act V of 1908), but that a mere agreement to refer to arbitration, even though in other respects valid, could not be such an adjustment in whole or in part of the suit as the Court could give effect to under Order XXIII, Rule 3.

VYANKATESH MAHADEV *v.* RAMCHANDRA KRISHNA ... (1914) 31 Bom. 687

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prepared and received within 2 months from the date of the agreement, and Rs. 500 on the transfer of the land after the conveyance should have been registered. It was further provided that should I not have paid the amount of the purchase money within the time fixed then he should forfeit his right to the earnest money and C should be at liberty to re-sell the property.

Held, that under the agreement time was of the essence of the contract.

Held, further, that I could not insist on C procuring a certificate from the Collector of Thana that all the conditions of the lease from the Secretary of State for India had been complied with.

BURJORJEE DHUNJIBHOY *v.* JAMSHED KHODARAM ... (1913) 38 Bom. 77

CONTRACT ACT (IX OF 1872), SEC. 65— [illegible]
p [illegible]
u. [illegible]
e [illegible]
b. [illegible]
a [illegible]
th [illegible] ... their possession was obstructed. In 1910, the plaintiff sued to recover possession of the property by redeeming the *valatdana patta* which he alleged was a mortgage. The lower Courts held that the alienation [illegible] V of 1862); and [illegible] L R 693, ordered [illegible] he had received [illegible]

Held, that the order of compensation against the plaintiff was justified, inasmuch as the agreement was discovered to be void within the meaning of section 65 of the Indian Contract Act (IX of 1872) long after the transaction, and as there was a personal covenant in the agreement

Per Shah, J.—Neither under section 65 [illegible]
the rul [illegible]
award [illegible]
to be v [illegible]
conside [illegible]
whether any person has received any advantage [illegible]
by section 65 or whether the covenant [illegible]
of compensation. The amount of c [illegible]
reference to the circumstances of each particular case.

HARIBHAI HANSJI *v.* NATHUBHAI RATNAJI .. .. (1913) 38 Bom. 249

COSTS *of unsuccessful petition by wife—Rights of the petitioner's solicitors over monies deposited in Court by the respondent as security for the petitioner's costs and over monies deposited by a respondent-appellant as security for the costs of the appeal.*

See DIVORCE ACT, INDIAN (IV OF 1869), SECS. 2, 4, 7 AND 45 ... 125

COURT FEE—*Setting up equity of cross-debt.*

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 268, 278, 283. 631

COURT OF SESSION, *committal to.*

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 213 ... 114

COURT OF WARDS ACT (BOM. ACT I OF 1905), SECS. 31 AND 32—*Sec. 32 of the Court of Wards Act (Bom. Act I of 1905) not retrospective.*] Section 32 of the Court of Wards Act (Bom. Act I of 1905) was not intended to apply to pending suits. In terms it refers to suits "brought by or against" a Government

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[illegible]

HARI GOVIND *v.* NARSINGRAO KONHERRAO ... ... (1913) 38 Bom. 194

COURT OF WARDS MADE PARTY AFTER DECREE—*Jurisdiction of the Court to execute its own decree.*

See CIVIL COURTS ACT (XIV OF 1869), SEC 32 662

CREDITOR—*Power of secured creditor of adjudicated insolvent to realise his security by means of a regular suit without obtaining leave.*

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———— FRAUD UPON.

See MORTGAGE 10

[illegible] 1898), SEC. 195, CLS. (*b*), (*c*)— [illegible] *n to prosecute—Indian Penal* [illegible] *—Offences committed before the* [illegible] is a Revenue Court within the meaning of that term as used in clauses (*b*) and (*c*) of section 195 of the Criminal Procedure Code, 1898.

PUNAMCHAND MANEKLAL, *In re* ... ... (1914) 38 Bom. 642

———————— SEC. 213—*Committal of a* [illegible] committal.

Held, that the reasons for committal must include not merely reasons for not discharging the accused, but reasons for sending him to the Court of Session, as the trial could be had either by the Magistrate himself or by the Court of Session; and that the omission to give the reasons was an illegality.

EMPEROR *v.* NANJI SAMAL ... ... (1913) 38 Bom. 114

———————— SEC 349—*Trying Magistrate sending up a case to the Sub-Divisional Magistrate on the ground that he cannot pass adequate sentence—Sub-Divisional Magistrate sending up the case to another Magistrate—Committal of the case by such Magistrate to Court of Session—Commitment not valid—Practice and Procedure.*] A Magistrate of the Second Class trying a case sent up the case to the Sub-Divisional Magistrate on the ground that he could not pass an adequate sentence. The latter transferred the case to a Magistrate of the First Class, who committed it to the Court of Session. A question having arisen if the commitment was legal.

Held, quashing the commitment, that under section 349 of the Criminal Procedure Code (Act V of 1898) it was the Sub-Divisional Magistrate alone who was competent to deal with the case.

EMPEROR *v.* VINAYAK NARAYAN ... ... (1914) 38 Bom. 719

CUSTOM—*Litigation between Hindus—Adoption of pre-emption as usage—Nature of proof required for adopting the custom.*

See MAHOMEDAN LAW 183

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whereas in the present case they had prescribed the location of the building in

If the condition of the permit were complied with, the plaintiff would have to

injunction as prayed.

Queen-Empress v. *Veerammal* (1892) 16 Mad. 230, referred to.

BAI FATMA *v.* RANDER MUNICIPALITY ... ... (1914) 38 Bom. 597

DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901), SECS 113, 122—*Suit against Municipality for re-instating a stone removed by it—Plaintiff's adverse possession—Municipality creature of the statute—Duties of Municipality—Municipal District—Encroachment—Obstruction to safe and convenient passage—*

therefore the Municipality had no right to interfere with it as there had been adverse possession for the statutory period of the portion of the street occupied by the stone.

On second appeal by the Municipality,

Held, that the Municipality was the creature of the Statute with duties *inter alia* to preserve the passage along public streets. It mattered not for the Municipality whether the encroachment had been in existence for 12 years or more. Under section 113 of the District Municipal Act (Bom Act III of 1901) the Municipality might, on proof that the encroachment objected to was an obstruction to the safe and convenient passage along a street, by written notice require the owner to remove it. Section 122 of the Act empowered the Municipality to remove the encroachment which might have been put up after the place had become a Municipal District.

In the present case the Municipality having failed to justify their action by reference to the said statutory powers, the decree was confirmed.

DAKORE TOWN MUNICIPALITY *v* TRAVEDI ANUPRAM ... (1913) 38 Bom. 15

DIVORCE ACT, INDIAN (IV OF 1869), SECS. 2, 4, 7 AND 45—*High Court Act 24 and 25 Vict., cl. 104, sec. 9—Amended Letters Patent of the Bombay High Court, cl. 35—Restitution of conjugal rights—Jurisdiction of the Bombay High Court to entertain a suit for the restitution of conjugal rights as against (a) a non-Christian respondent and (b) a respondent not residing within the Presidency—Principles and Rules of English*
causes a
conjuga
is instit
(corresp
—Resid
to pron
petition ... *rights of the petitioner's solicitors over monies deposited in Court by the respondent as security for the petitioner's costs and over monies deposited by a respondent-appellant as security for the costs of the appeal.*] The respondent, a Parsi, married the petitioner, a Christian, in London. Subsequently the parties

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EASEMENTS ACT (V OF 1882), SECS. 18, 23 —*Easement—Projection of eaves—* [illegible]

If a man has acquired an easement from a projection of his eaves to a fixed extent over his neighbour's land, he can raise the height of those eaves so long as he does not throw an increased burden on the servient tenement.

[illegible]

MULIA BHANA *v.* SUNDAR DANA ... ... (1913) 38 Bom 1

EJECTMENT, SUIT FOR— [illegible]

can show.

To succeed in ejectment it is only necessary for the plaintiff to establish such title as carries a present right to possession.

Ordinarily, unless there is an express agreement for the expiry of a tenancy on a certain day, a tenancy from year to year is only determined by a notice to quit.

It is a reasonable inference that if the plaintiff had not asserted his right as yearly tenant for eight years, he must be taken to have abandoned the tenancy or to have relinquished such other occupancy right as he might have, and if so, he would have no right to present possession such as would entitle him to maintain a suit for ejectment.

The defendant in ejectment might set up and prove *jus tertii*.

The defendant is entitled to rely on the *jus tertii* appearing from the facts adduced by the plaintiff to defeat his claim

SITARAM BHIMAJI *v.* SADHU ... ... (1913) 38 Bom. 240

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ENCROACHMENT—*Municipal District—Adverse possession—Obstruction to safe and convenient passage—Notice of removal—Justification by reference to statutory powers.*

See DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901), SECS. 113, 122 ... 15

ENDORSEE—*Interest in the goods—Action for damages.*

See RAILWAY RECEIPT 659

EQUITABLE MORTGAGE—*Deposit of title-deeds of property situate in mofussil—Intention to create charge, proof of.*

See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 9 ... 372

ESTOPPEL—*Parties in pari delicto.*] *Held*, that in the case of a contract where both the parties were *in pari delicto* the plaintiff was not entitled to estop the defendant from showing the illegality of his title, nor was there any estoppel against any Act of Parliament or in India against an Act of the Legislature.

SHRIDHAR BALKRISHNA *v.* BABAJI MULA ... .. (1914) 38 Bom. 709

EVIDENCE—*Practice regarding admission—Appellate Court.*

See CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER XLI, RULE 27 ... 665

EVIDENCE ACT (I OF 1872), SEC 30—*Co-accused—Confession—Independent corroboration—Evidence—Practice.*] Eleven accused persons were tried for the offence of dacoity. There was no direct evidence against any of them. Seven of these confessed, each one implicating himself and the rest. They were [illegible]

statements, no conviction based only upon the confessions of co-accused was good in law. Owing to this difference in opinion, the case was referred to Macleod, J.—

[illegible] ct, 1872, [illegible] ssion of a [illegible] down a [illegible] founded solely on the confession of a co-accused could not be sustained.

Held, further, that the confession of one co-accused could not be said to be corroborated by the confession of other co accused.

Per Macleod, J.—I do not think that "confession", in section 30 can be restricted to an unretracted confession, as once a confession is proved it may be taken into consideration.

EMPEROR *v.* GANGAPPA KARDEPPA ... ... (1913) 38 Bom 156

——————SECS. 40, 41, 42 AND 44—*Probate Act (V of 1881), sec. 59—Will—Probate—Suit by the executor to recover possession and rent—Plea that the will was a fabrication and that probate had been obtained by fraud—Previous unsuccessful application by defendant to District Court to revoke probate on the same grounds, effect of—Jurisdiction of the Subordinate Judge to*

Page

made a will
the whole of
the District
the probate

The widow of Lingappa made an adoption and she and the adopted son brought the present suit for a declaration that the testator had no power to make a will and to alienate the property which being service inam was inalienable.

Held, that the settlement of the Navalgund Desai of the year 1862 was a settlement valid and binding upon Government, that under the settlement the Desai was no longer liable to render any service in respect of the lands held by him and they were, therefore, no longer held upon service tenure and that the possession of lands as service lands for 200 years in the absence of any evidence as to family custom could not impress them with character of inalienability.

Held, further, that where service has been commuted for a quit-rent, if the donee's descendants should continue to pay the rent, the tenure would be altered from service to rent, that in the case of service land, which in practice at all events was not usually alienated, it would be difficult to establish a family custom which should have any effect, as distinct from the ordinary incidents of a service tenure, and evidence that land had remained in a family for a long period of years and had descen
land, would be more
than with the theory
come to an end the last
to a tenure based upon
the property of an or
agreed quit-rent to Government and in the absence of co-parceners the owner could dispose of the lands by will.

Held, further, that under section 11 of the Code of Civil Procedure it was not open to the Court, after the decision of the District Court granting probate of the will, to try the question of the authority of the widow to adopt, which question was bound up with the question of the revocation of the will in the present suit, inasmuch as the issue decided by the Probate Court had conclusively determined between the parties the question of whether or not the testator had revoked his will before death and whether the statement that he had given authority to his widow to adopt expressed his wishes at the time of his death, and inasmuch as the District Court which had tried the probate case was a Court competent to have tried the present case.

BRENDON *v.* SUNDARABAI ... ... (1913) 38 Bom. 272

INCOME-TAX COLLECTOR—*Whether Revenue Court.*

See CRIMINAL PROCEDURE CODE (ACT V 1898), SEC. 195, CLS. (*b*) AND (*c*) 642

INJUNCTION—*Power of Court to grant mandatory injunction pending trial.*

See CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER XXXIX, RULE 2 381

Page

performed from D's house and at his expense. J and X were at times also employed by D and I in their business for wages. In the year 1902 D made a gift to I of his property at Malad reserving about Rs. 7,000 to himself.

that the release of been obtained by acted upon. They

accordance with their interests so ascertained and declared, that all necessary I might night be binding of the of the

D and I filed written statements denying the allegations as to fraud, etc., and asserting that the release of the 13th of February 1879 had been acted on. It was assumed in the pleadings that the parties were governed by the Hindu law of the joint family.

Held, that as to the law governing Khojas the proper way to approach the question was as follows :—

1. Where Mahomedans were concerned the invariable and general presumption was that they were governed by the Mahomedan law and usage and that it lay on a party setting up a custom in derogation of that law to prove it strictly.

2. But that in matters of simple succession and inheritance it was to be taken as established that succession and inheritance among Khojas and Memons were governed by Hindu law "as applied to separate and self-acquired property".

Held, accordingly, that the plaint disclosed no cause of action at all unless the plaintiffs had alleged and were prepared to prove two or three salient features of the Hindu law of the joint family as customs adopted by the Khojas of Bombay as the question involved in the suit did not really arise on

rights therein nor sue for partition.

nt family under Hindu ry 1879 he went out of d infant son, that the Mahomedan law as the mere transfer of a *spes successionis* as under Mahomedan law the plaintiffs had no cause of action and that X, having been born after his father A had gone out of the family, from the point of view of members of the joint family did not exist.

e facts that their grand- n and got them married, it family, that what was uch family arrangements Hindu law) was not the question but at the time

Page

it was made and that if there was then an adequate motive the Court would not scrutinize too closely the adequateness of the consideration.

Ramdas v. *Chabildas* (1910) 12 Bom. L. R. 621, applied.

Semble, where the existence of a document if valid and binding on a party would defeat his suit to recover possession of any property, he must sue under [illegible]

Simble, Article 127 of the Limitation Act does not apply to Mahomedans as such or to Khojas and Memons except where the property is shown to have gone through one unimpaired descent and thereafter to have been held by the survivors as joint family property.

Wasantrao v. *Anandrao* (1904) 6 Bom. L. R. 925, considered.

Semble, also, since no Khoja son can enforce a partition it follows that he cannot be a co-sharer.

Ahmedbhoy Hubibbhoy v. *Cassumbhoy Ahmedbhoy* (1889) 13 Bom. 534 and *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (1888) L. R. 15 I. A. 51, considered.

JAN MAHOMED *v* DATU JAFFER ... ... (1913) 38 Bom. 449

KHOTI SETTLEMENT ACT (BOM. ACT I OF 1880), SECS. 9, 10—*Khoti Takshim —Resignation of occupancy rights—Transfer—Lease for a term of years—Expiration of the lease—Suit to recover possession—Impeachment of plaintiff's title—Consent of khots necessary for transfer—Resignation accompanied by* [illegible] The defendant resigned his [illegible] was one of the khots, in [illegible] ase for a term of five [illegible] intiff in respect of the [illegible] consideration.

After the expiration of the term of the lease, the plaintiff sued to recover possession of the lands and the defendant impugned the plaintiff's title.

Held, dismissing the suit for recovery of possession, that the foundation of the plaintiff's title in 1905 was illegal, that the resignation and lease having [illegible] formed part of what was virtually one [illegible] to amount to were [illegible] statute law, namely, [illegible] ng must go with it, [illegible] khots including the [illegible] was not shown that [illegible] conditions stated in [illegible] der that section, nor [illegible] ction 10 of the said [illegible]

Held, further, that in the case of a contract where both the parties were *in pari delicto* the plaintiff was not entitled to estop the defendant from showing the illegality of his title, nor was there any estoppel against any Act of Parliament or in India against an Act of the Legislature.

SHRIDHAR BALKRISHNA *v.* BABAJI MULA ... ... (1914) 38 Bom. 709

KHOTI TAKSHIM—*Resignation of occupancy rights—Transfer—Lease for a* [illegible] *possession—Impeachment* [illegible] *sfer—Resignation accom-* [illegible] *ppel.*

See KHOTI SETTLEMENT ACT (BOM. ACT I OF 1880), SECS. 9, 10 ... 709

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LAND ACQUISITION ... *quisition of land for quarrying purposes— ... is element for consideration—Compensat ...* npulsorily acquired by Government for quarrying purposes, its special adaptability for quarrying is an element for consideration in fixing the amount of compensation.

DAYA KHUSHAL *v.* ASSISTANT COLLECTOR, SURAT ... (1913) 38 Bom. 37

————————— sec. 7—*Necessity of such proceedings in case of public streets*

See RAILWAYS ACT (IX OF 1890), SEC. 7 565

————————— sec. 54—*Bombay Civil Courts Act (XIV of 1869), sec. 16—Civil Procedure Code (Act V of 1908), sec. 96 (1)—Reference to Assistant Judge—Award not exceeding Rs. 5,000—Appeal to the District Judge—Second appeal to the High Court not maintainable.*] A reference having been made in accordance with the provisions of the Bombay Civil Courts Act (XIV of 1869) to the Assistant Judge, he tried the reference and made an award under the Land Acquisition Act (I of 1894) which did not exceed Rs. 5,000. An appeal was presented against the said award to the District Judge and he having decided the appeal, a second appeal was preferred to the High Court.

Held, that under section 16 of the Bombay Civil Courts Act (XIV of 1869) ... dge's Court where ... District Court and ... by the Act, the ...

AHMEDBHOY HABIBBHOY *v.* WAMAN DHONDU ... (1913) 38 Bom. 337

LAN ... *sfer of Property ... t to cut trees— ...* rmanent tenant, ... nted trees upon ...

The English law of fixtures and the principles upon which it is based have no applicability in this country.

SITABAI *v.* SAMBHU SONU ... . (1914) 38 Bom. 716

... *suit by the plaintiff to recover rent—Subsequent suit barred.*

See CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER II, RULE 2 ... 444

————————— *Lease of land by an agent of landlord—Collection of rent by the agent—Agent paying over the rent to landlord—Agent setting up his own title and keeping the rent to himself during continuance of lease—Landlord's right to land at determination of tenancy.*

See ADVERSE POSSESSION 53

LEASE—*Landlord to recover possession on tenants' failure to pay rent—Suit by landlord to recover possession on tenants' failure—Decree directing plaintiff to recover possession on tenants' failure to pay rent within three months—Defendants'*

Page

[illegible]

suit to recover the money on the [illegible] from the period of limitation the time between the 2nd [illegible] 1913:—

Held, that though the plaintiff was not entitled to [illegible] March to 30th May 1913, he was entitled to such [illegible]

Page

Held, further, that the appeal against the order dismissing the appeal was a second appeal and not a first appeal because it was an appeal against the decree of an appellate Court.

RAOJI *v.* KRISHNARAO ... ... (1914) 38 Bom. 613

LIMITATION ACT (IX OF 1908), SEC. 7, SCH. I, ART. 44—*Joint Hindu family* [illegible]

[illegible]

n of the *mukhtiar*-
including the widow
deed was registered
as the widows admitted the same. Subsequently the *mukhtiar* sold *mulgeni* [illegible]

ab initio

The lower Courts having dismissed the suit, on second appeal by the plaintiffs,

Held, that (1) the sale by the *mukhtiar* was binding on plaintiffs as having been within the authority conferred by the *mukhtiarnama*.

(2) The sale could not be treated as a nullity, inasmuch as a dying adult Hindu might appoint a manager and trustee for the minors themselves without interfering with the succession to the property.

Raj Lukhee Dabea v. *Gokool Chunder Chowdhry* (1869) 13 Moo. I. A. 209 and *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh* (1866) 7 W. R. 74, referred to.

(3) The right of plaintiff 1, if any, to challenge the sale was barred at the date of the suit under Article 44, Schedule I of the Limitation Act (IX of 1908) by reason of his failure to sue within three years of his attaining majority.

(4) Plaintiff 2, a minor, was also barred under section 7 of the Limitation Act (IX of 1908) inasmuch as plaintiff 1 after attaining majority could have bound the minor plaintiff if he had chosen to give a discharge and acquittance of all claims to the defendants in respect of *mulgeni* (leasehold) interests, as manager.

MAHABLESHVAR KRISHNAPPA *v* RAMCHANDRA MANGESH ... (1913) 38 Bom. 94

——— SEC. 15—*Decree—Execution of decree—Application to execute the decree*— [illegible]

[illegible]

August 1911, the decree-holder applied again to execute the decree. The lower Courts held that the second application was barred by limitation, it having been made more than three years after the date of the first application. On second appeal :—

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BAI UJAM *v.* BAI RUXMANI ... ... (1913) 38 Bom. 153

LIMITATION ACT (IX OF 1908), SEC. 19, SCH. I, ART. 182, CL. 5—*Written acknowledgment—Application made for certifying payments on the decree acknowledging the decree as an outstanding decree—Step-in-aid of execution.*] The plaintiff obtained a decree on the 3rd July 1900 whereby he was required to pay a sum of Rs. 600 by annual instalments of Rs. 50 and to redeem the mortgaged land. The decree also provided that on failure to pay any two instalments the plaintiff's right to redeem was to be foreclosed and the defendant was to be placed in possession of the land. The instalments for 1901 and 1902 were duly paid, while the one for 1903 was only paid in part. No other payments were made. ... which was ... satisfaction ... ing decree. ... ecree; but ... again on the ... barred by

Held, that the application was within time, for the application of 1905 was sufficient to give a fresh starting point for limitation, either as an acknowledgment within the meaning of section 19 of the Limitation Act (IX of 1908), or as a step-in-aid of execution under Article 182, clause 5 of the First Schedule to the Act.

BACHARAJ NYAHALCHAND *v.* BABAJI TUKARAM ... (1913) 38 Bom. 47

——— ART 62—*Payment by cheque.*] In case of payment by a cheque, limitation runs not from the date of the delivery of the cheque, but from the date of the receipt of the money by the payee.

SECRETARY OF STATE FOR INDIA *v.* MAJOR HUGHES ... (1913) 38 Bom 293

——— ARTS 91 AND 127—*Cancellation of the document.*

See KHOJAS 419

——— ARTS 116, 66, SEC 19—*Registered bond—Suit to recover money due on the bond—Period of limitation—Acknowledgment contained in promissory notes.*] On the 17th June 1897, the defendant passed a registered mortgage bond in favour of the plaintiff. It was attested by one witness and made the mortgage amount repayable in three instalments, the last one becoming due on the 24th June 1900. On the 24th August 1903, the defendant passed a promissory note in favour of the plaintiffs, wherein he stated: ... ge-deed is set ... romissory note ... plaintiff sued

Held, that the words used in the two promissory notes amounted to acknowledgments within the meaning of section 19 of the Limitation Act.

Held, further, that the suit was governed by Article 116 and not by Article 66 of the Limitation Act, for though the suit was in form a suit for money due on a bond, it was in substance a suit for compensation for breach of a contract.

Ramdin v. Kalka Pershad (1884) L. R. 12 I. A. 12 and *Bulakhi Ganu Shet v. Tukarambhat* (1889) 14 Bom. 377, commented on.

DINKAR HARI *v.* CHHAGANLAL NARSIDAS ... (1913) 38 Bom. 177

[illegible]

Property Act (*IV of* 1882), *sec* 101.] In 1886, certain property was mortgaged [illegible]

party. [illegible]

a party. [illegible]

execution of the decree subject to the first mortgage and was purchased by H with the permission of the Court In 1908, the decree-holder applied to execute the decree of 1898. H was made a party to the execution proceedings. It was contended by H that he was not bound by the decree under execution and was entitled to have the mortgage amount determined again in the execution proceedings. The decree-holder urged that H's mortgage had been extinguished by his purchase at the Court sale; and as such purchaser he was bound by the decree by which the original mortgagors were bound at the date of the auction sale; and that H did nothing to show that he intended to keep alive his mortgage.

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P [illegible]

busine-s dealing as merchants and commission agents, largely in cotton and to a small extent in linseed. There was one transaction in cotton between the parties and the defendant entered into transactions in linseed to the extent of 4,000 tons in all with the plaintiffs, which transactions the plaintiffs passed on to various purchasers, 39 in all, between which purchasers and the defendant there was no privity whatever. In the contract made by the plaintiffs with each of the said purchasers there was a term that delivery should not be given to the firm of Narrondas Rajaram & Co, a Marwari firm, who were in the habit of insisting on delivery and of refusing to settle contracts by the payment or receipt of differences.

The plaintiffs subsequently attempted to secure evidence to show that the transactions between themselves and the defendant were genuine transactions and not wagers. They endeavoured to induce the defendant to sign a draft letter prepared by the plaintiffs' attorneys in which instructions were given for the [illegible]

[illegible] the view to influence the result of litigation

Held, that in view of the fact that the *pakka adatia* was not a disinterested broker but a party to the contract whose intention to gamble or otherwise might well be known at the inception of the contract, and that there was no privity between the defendant and the 39 buyers from the plaintiffs, the existence of such purchasers was only relevant as affording an indication of the [illegible] intention at the time of the contracts with the defendant, but in view of the condition that delivery should not be given to Narrondas Rajaram & Co., it [illegible]

[illegible] from the defendant.

Held, further, that on an examination of the business of the contracting parties and on the surrounding circumstances of the case it appeared that the [illegible] intention of the parties was that the plaintiffs and the defendant should [illegible] differences and settle that way and that accordingly the suit must [illegible]

Bhagwandas v. *Kanji* (1905) 30 Bom 205, discussed.

Page

(2) AND
ss order
proved
.nsolvent
applying for annulment of an adjudication order, duty of Court to scrutinise—Discretion of Court, how exercised] A debtor who has been adjudicated insol-
draw his
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properly proved in bankruptcy must have been fully paid in cash.

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In re Keet [1905] 2 K. B. 666 at p. 677, applied.

IN THE MATTER OF MEGHRAJ GANGABUX ... ... (1912) 38 Bom. 200

——————————SEC. 17—*Leave of* ... *his security*
ained a decree
ney, assigned
nies advanced
became insolvent and his property being vested in
recovered by the Official Assignee.

Held, that the Official Assignee, having executed a decree which had been assigned by way of security, was in the position of a mortgagor who had sold the mortgaged property and was in possession of the sale-proceeds, that until the

Page

...icial Assignee ...ditor in such ...he amount so ... Court under ... to section 17

LANG *v.* HEPTULLABHAI ISMAILJI ... ... (1913) 38 Bom. 359

PRESUMPTION *of right arising from possession applies as much to defendant as to plaintiff.*

See EJECTMENT, SUIT FOR 240

PRIVY COUNCIL, LEAVE TO APPEAL TO—*Final order—Interlocutory order*—

the legal representative of a deceased party to a pending appeal, applied to have ... application and ... The applicant ... rejecting the application —

Held, that the order having been passed on an application in a pending appeal, was not a final, but an interlocutory, order; and that no appeal lay from it to His Majesty in Council under the provisions of clause 39 of the Amended Letters Patent.

GANGAPPA REVANSHIDAPPA *v.* GANGAPPA MALLESHAPPA. (1914) 38 Bom. 421

PROBATE—*Contentious proceeding for probate—Will not proved—Probate refused—Suit for recovery of property from defendants who held as executors.*

See EVIDENCE ACT (I OF 1872), SEC. 41 309

——— ———*Will—Decision of Probate Court not to be destroyed by adjudication in a regular suit.*

See INAM LANDS 272

PROBATE AND ADMINISTRATION ACT (V OF 1881), SEC. 59—*Will—Probate—Suit by the executor to recover possession and rent—Plea that the will was a* ...

KISHORBHAI REVADAS *v.* RANCHODIA DHULIA ... ... (1914) 38 Bom. 427

——— ——— ——— SEC. 83—*Contentious proceeding for probate—Will not proved—Probate refused—Suit for recovery of property from defendants who held as executors.*

See EVIDENCE ACT (I OF 1872), SEC. 41 309

PROMISSORY NOTES, ACKNOWLEDGMENTS CONTAINED IN.

See LIMITATION ACT (IX OF 1908), ARTS. 116 AND 66, SEC. 19 ... 177

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SECS. 23, 27—*Small Cause suit—Question of title—Suit transferred to the ordinary jurisdiction of the Court—No substantial irregularity—Decision on title—Decree not final—Appeal.*] In a suit which was originally filed as a Small Cause Court suit in the

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Held, further, that where a railway company wished to lay a line of railway ... proceed under ... if the Govern- ... order for the ... and the land ... pany free from incumbrances and would then cease to be a portion of the street and the railway company would be unable to exercise the power given to it of constructing the railways upon and across the "street".

Held, further, that the effect of section 289 of the City of Bombay Municipal Act vesting all public streets, pavements, stones and other materials in the Corporation and under the control of the Commissioner was only to vest in that body such property as was necessary for the control, protection and maintenance of the street as a highway for public use.

G. I. P. RAILWAY COMPANY *v.* MUNICIPAL CORPORATION OF THE CITY OF BOMBAY ... ... (1913) 38 Bom. 565

REDEMPTION SUIT—*Agriculturist—Mortgage in form of sale—Intention of the parties at the time of the transaction.*

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SECS. 2 (2), 10A 18

———————*Direction to a Commissioner to take account—The direction not a preliminary decree.*

See CIVIL PROCEDURE CODE (ACT V OF 1908), SECS. 2, 97, ORDER XXVI, RULES 11, 12 (2) 392

REGISTERED BOND—*Suit to recover money due on the bond—Period of limitation.*

See LIMITATION ACT (IX OF 1908), ARTS. 116 AND 66, SEC. 19 ... 177

REGISTRATION—*Deed acknowledging equitable mortgage by deposit of title-deeds.*

See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 59 372

———————*Instrument reserving a life-estate to the maker, not a will—Instrument creating interest in adoptive mother—Value of the interest in excess of Rs. 100—Registration.*] Any instrument which confers or reserves a life-estate to the maker is not a will.

A deed of adoption by which an interest is reserved to the wife of the adopter in immoveable property which she otherwise would not have possessed and could not have possessed when such interest exceeds in value Rs. 100 requires registration.

PIRSAB valad KASIMSAB *v.* GURUPPA BASAPPA ... (1913) 38 Bom. 227

... This agreement was not registered. The plaintiff having brought a suit against the defendant

Page

for ... to re-convey, the lower Cou ... ment was compulsorily regi ... ( ). Registration Act (III of 1877).

On second appeal by the plaintiff,

Held, reversing the decree, that the agreement did not require registration.

Separated entirely from the defendant's registered conveyance, plaintiff's unregistered document was nothing more than an ordinary agreement to sell and such agreements were expressly exempted from the operation of section 17, ... 7) by clause (*h*) and of ... exception (v). Having ... more than an ordinary agreement to re-convey.

SAYAD MIR GAZI *v.* MIYA ALI ... ... (1914) 38 Bom 703

REGISTRATION ACT (III OF 1877), SEC 17, CL. (*e*)—*Stamp Act* (*II of* 1899), *Sch. I, Art.* 22—*Trusts Act* (*II of* 1882), *sec* 5—"*Composition deed*"—*Compounding of debts due—Transfer of immoveable property—Registration not necessary*] With the consent of creditors to the extent of Rs. 1,22,000 out of the total number of creditors claiming Rs. 1,61,800 of the family firm represented ... specified assets of the ... in (by a particular ... properties had been ... ard to the amounts ... e minor members of ... e written off against ... eed as a release passed ... were to manage the ... monies realized from time to time were to be distributed among such creditors in proportion to their claims. The properties comprised in the deed, moveable as well as immoveable, were transferred to the trustees in due course. The deed was unregistered.

Subsequently in a suit brought by the trustees to recover possession of a house comprised in the deed, a question having arisen whether the deed was a composition deed,

Held, that the definition of the term "composition deed" as given in Article 22, Schedule I of the Stamp Act (II of 1899), meant the same thing as the term "composition deed" in section 17 of the Registration Act (III of 1877), ... property and not to a mere agreement to take fractional payment of money in settlement of claims, that the test of a 'composition deed" was that there ought to be a compounding of debts due and that such a deed fell under clause (*e*) of section 17 of the Registration Act (III of 1877) and did not require registration under that Act nor under the provisions of section 5 of the Trusts Act (II of 1882).

Held, accordingly, that the deed in question was a composition deed within the meaning of section 17, clause 2 of the Registration Act (III of 1877), and did not require registration.

CHANDRASHANKAR *v.* BAI MAGAN ... ... (1914) 38 Bom. 176

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STAMP ACT (II OF 1899), SEC. 36—*Order to banker to pay money held to the credit of customer.*

See SUCCESSION ACT (X OF 1865), SEC. 190 618

——————SCH. I, ART. 22—*Registration Act (III of* 1877), *sec.* 17, *cl.* (*e*)—*Trusts Act* (*II of* 1882), *sec.* 5—"*Composition deed*"—*Compounding of debts due—Transfer of immoveable property—Registration not necessary.*] With the consent of creditors to the extent of Rs. 1,22,000 out of the total number of creditors claiming Rs 1,61,800 of the family firm represented by one B, the latter executed a deed making over all the specified assets of the family to certain nominated trustees. The creditors coming in (by a particular day)

B and the minors were to make use of the deed as a release passed on their behalf. The deed also provided that the trustees were to manage the properties for the benefit of the creditors interested and the monies realized from time to time were to be distributed among such creditors in proportion to their claims. The properties comprised in the deed, moveable as well as immoveable, were transferred to the trustees in due course. The deed was unregistered.

Subsequently in a suit brought by the trustees to recover possession of a house comprised in the deed, a question having arisen whether the deed was a composition deed,

Held, that the definition of the term "composition deed" as given in Article 22, Schedule I of
"composition deed'
term so defined cc
benefit of creditors
dividend was secu
purpose of working the debtor's business for the benefit of his creditors, that the inclusion of the
(III of 1877)
property and
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section 17 of
under that A
1882).

Held, accordingly, that the deed in question was a composition deed within the meaning of section 17, clause 2 of the Registration Act (III of 1877), and did not require registration

CHANDRASHANKAR *v.* BAI MAGAN ... ... (1914) 38 Bom. 576

STAY FURTHER PROGRESS OF SUIT, APPLICATION TO.

See CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER XXIII, RULE 3, SCH. II, CLS. 1-16 687

STEP-IN-AID OF EXECUTION—*Application for certifying payments on the decree acknowledging the decree as an outstanding decree.*

See LIMITATION ACT (IX OF 1908), SEC. 19, SCH. I, ART. 182, CL. 5 ... 47

STOPPAGE IN TRANSIT—*Railway receipts, effect of assignment of—Instruments of title.*

See CONTRACT ACT (IX OF 1872), SECS. 4, 61 AND 103 ... 255

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SUCCESSION—*Full sister—Son of a separated half-brother—Priority.*

dministration obtained by
-Transfer of Property Act
y held to the credit of
899), *sec.* 26—*Resulting*
under a deposit receipt
a grand-nephew H, to

whom he wished to transfer the money, meaning that H should have the benefit of the money, but not intending that he should be able to make away with the money in W's life-time or to draw the interest without making due provision for W's maintenance. On the 8th of August 1912 W handed to H his deposit receipt duly endorsed and a letter to the following effect :—

"I hereby state that I have found my Bank Receipt Herewith I am forwarding the same for the interest now due. I wish it to be handed over to my nephew.

"I also wish you to hand over the amount of Rs 10,500 which is in fixed deposit to my nephew Wilmot-Charles Harrison to his account."

... and asked for and obtained a new
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... the plaintiff
have been
Letters of
to proceed,
190 of the

of a customer was not an assignment of a debt, but an authority to deliver property, which, if acted on, was equivalent to delivery by the customer, and
and had been acted
ng before the lower
nt such an objection

Held further, that the intention of the donor, W, to benefit negatived the idea of any resulting trust in his favour.

SETHNA *v.* HEMINGWAY ... ...(1914) 38 Bom 618

SUMMARY SETTLEMENT—*Service inam land—Alienation.*

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case, Ganendra Mohan Tagore v. *Jatindra Mohan Tagore* (1872) 9 Bom. L.R.377. A question having arisen as to whether the condition of the daughter having a son (at the death of the testator) not being fulfilled, there was a case of intestacy,

Held that there was no intestacy. The intention of the testator was to give the whole of his property to his grandson (daughter's son). That intention having failed, the dominant intention of the testator was, subject to his daughter's life estate, to retain the estate in his own family, that is to say, in the hands of his cousins.

NARANDAS VRIJBHUKHANDAS *v.* BAI SARASWATIBAI ... (1914) 38 Bom. 607

WILL—*Construction of will—Self-acquired property—Bequest dividing property between testator's two sons with gift over to survivor—Survivorship whether limited to survivorship during testator's life or extending to period after his death—Period of distribution—Hindu Law.*] A Hindu resident of Surat in the Presidency of Bombay made a will dated 20th August 1899 by which after appointing his two sons "executors, heirs and owners" of the whole of his property (which was self-acquired) and directing them to divide and take equal shares in it with certain exceptions, gave each of them a half share of his estate not specifically disposed of by the will By clause 9 he made the following bequest, "I have divided between and given to my two sons the whole of my property as mentioned above. But should either of these two sons die without [illegible] duly to [illegible] son who [illegible] fray) the expenses in connection with the maintenance of his widow and marriage of his [illegible] mstances the heirs of my deceased son [illegible]" The testator died on 4th July 1901 [illegible] e elder son died on 2nd January 1903 [illegible] nt by the surviving son to enforce the [illegible] High Court held that the period of [illegible] was the period of his death at which [illegible] n each of his sons absolutely, and that [illegible] vivorship there provided was limited to [illegible]

Held (reversing that decision) that the words of clause 9 were not limited to survivorship during the testator's life, but clearly pointed to survivorship whenever it should occur, and that the surviving son was as such survivor entitled to the estate conveyed by the clause, subject to the obligation imposed upon him of maintaining his brother's widow and daughter.

CHUNILAL PARVATISHANKAR *v* BAI SAMRATH ... (1914) 38 Bom. 399

———*Contentious proceeding for probate—Will not proved—Probate refused—Suit for recovery of property from defendants who held as executors.*

See EVIDENCE ACT (I OF 1872), SEC. 41 399

———*Instrument reserving a life-estate to the maker is not a will.*

See REGISTRATION 227

———*Probate—Decision of Probate Court not to be destroyed by adjudication in a regular suit.*

See INAM LANDS 272

THE

INDIAN LAW REPORTS,

Bombay Series.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr Justice Beaman

DHED MULIA BHANA (ORIGINAL DEFENDANT), APPELLANT, *v* DHED SUNDAR DANA (ORIGINAL PLAINTIFF), RESPONDENT.* 1913 *July 3*

Easements Act (V of 1882), sections 18 and 23—Easement—Projection of eaves—Raising the height of the eaves—Burden on the servient tenement not to be increased—Customary easement—Privacy—Invasion

The term "easement" as defined in the Easements Act (V of 1882) applies just as much to a projection of eaves in a dry country where there is no discharge of water as in a country where there is abundant rainfall and there is discharge of water

If a man has acquired an easement from a projection of his eaves to a fixed extent over his neighbour's land, he can raise the height of those eaves so long as he does not throw an increased burden on the servient tenement

The defendant constructed a window and apertures (*jalis*) in the back wall of his house and they commanded the plaintiff's *khadki* or courtyard which could be used for females to bathe and similar purposes of privacy From the defendants' window the people sleeping in the plaintiff's house could be seen and from the apertures, though above a man's height, a person, if he was so inclined, could peep through into the plaintiff's house and the male apartment next to the open verandah (*osari*). The plaintiff having sued for an injunction restraining the defendant from making any openings in his wall,

Held, that though it was doubtful whether the plaintiff was entitled to relief on the ground of the invasion of his privacy, still as there was a written agree-

*Second Appeal No 96 of 1913

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ment between the parties in the year 1879 whereby the defendant's father agreed that he would not make any opening in his back wall, the plaintiff had the right to require the defendant to close the said apertures and window.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, in cross appeals Nos. 260 and 284 of 1911, varying the decree of M. B. Bhatt, First Class Subordinate Judge.

The plaintiff sued for (1) an injunction permanently restraining the defendant from making any opening whatever in his back wall abutting on the plaintiff's courtyard, (2) an injunction restraining from obstructing him in building a wall on his own land so as to close up the new openings made by the defendant during the pendency of the suit, (3) an injunction permanently restraining the defendant from shifting his eaves from the position in which they stood and beyond 10 inches which was their original projection, (4) an injunction permanently restraining the defendant from raising his house so as to disturb the light and air enjoyed by the plaintiff's house, (5) an order for the removal of the acts complained of, should they be made during the pendency of the suit and (6) such other relief as the Court might deem proper to award. The plaint alleged that the defendant was rebuilding his house with the intention of raising it and to shift his eaves and to project them beyond their limit of 10 inches on the ground of plaintiff's courtyard and that such acts would disturb the privacy of his house and interfere with its light and air.

In denying the plaintiff's claim the defendant contended *inter alia* that there were in the back wall of his house two apertures and one window for more than 20 years past, that the plaintiff had not acquired the easement to receive light and air to his house as the story thereto was raised within the last 20 years and

that no injury resulted to the plaintiff by his raising his house.

The Subordinate Judge found that the defendant's back wall was a dead wall without openings as alleged by the plaintiff, that the defendant had not projected his eaves beyond their former limit, that the plaintiff had acquired no right of easement to the upper story of his house, that the plaintiff could not prevent the defendant from raising his house, that the plaintiff was entitled to and had enjoyed privacy with respect to his upper story and that the defendant's intended building interfered with the privacy of the plaintiff's house.

The Subordinate Judge therefore issued an injunction requiring the defendant to close his two apertures and one window in dispute in the back wall of his house in suit and restraining him from ever making any opening whatever in the said wall in future. In other respects the plaintiff's suit was dismissed. In connection with the plaintiff's claim relating to the window and the apertures the Subordinate Judge referred to an agreement, Exhibit 23, dated April 1879. The agreement was produced by the plaintiff and it contained a stipulation on the part of the defendant's father that he would not make any opening whatever in his back wall. With respect to the plaintiff's claim as to the eaves the Subordinate Judge observed :—

It is true defendant has raised his house and has in doing so shifted the position of the eaves It is argued for the plaintiff that on the authority of the ruling in *Ranchod* v *Abdulabhai* (Bom L. R. 6, p 356) the defendant has only the right to maintain his projection where it was originally and that he cannot shift its position This ruling related to the right of the owner of the soil to build below and above the said projection without disturbing the projection as such. The ruling decided that the ownership of the column below and above the projection remained with the owner of the soil. This ruling does not consider the question of easement, for apart from the encroachment and adverse possession the defendant has in the present instance acquired the right of easement to discharge his eaves in the plaintiff's ground

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Defendant's house is there these more than 20 years and defendant has discharged rain water from his roof on the plaintiff's ground In raising his house defendant does not, I think, increase the burden in the plaintiff's soil. By raising his house defendant has given the plaintiff the facility to raise his own house if he liked provided he managed to receive the rain water from his (defendant's) eaves into some structure like a terrace.

Both the parties preferred cross-appeals. The plaintiff in his appeal urged that the First Court was wrong in its finding as to the right of the defendant to project his eaves, and the defendant in his appeal urged that the first Court was wrong in its finding as to the plaintiff's right of privacy and in finding that the windows were new.

The District Judge dismissed the defendant's appeal and in allowing the plaintiff's appeal enjoined the defendant "not so to construct the eaves of his new roof as to project over the land of the plaintiff" for the following reason :—

The right to protrude eaves over the land in possession of another is a totally different right to an easement to discharge rain-water Rain-water can be discharged without protrusion of eaves and eaves can be protruded without discharge of rain-water The right to protrude eaves is a physical invasion of immoveable property and as such is exposed to a prescription of 12 years. Therefore the fact that a person has had his roof encroaching in one part of plaintiff's column of air gives him no right to give up his old encroachment and begin an entirely differently situated encroachment, still less to further protrude.

The defendant preferred a second appeal.

G. N. Thakore, for the appellant (defendant).—The finding that we have projected our eaves is due to a misapprehension of the law. It was admitted in the plaint that our original eaves projected to the extent of 10 inches and relief was claimed on that footing. The first Court found that our present eaves are in a line with the eaves of the other house. The District Court erroneously assumed that the projection of the eaves was an encroachment and found that there was an

encroachment because the present eaves are differently situated. The projection of eaves is an easement as held in *Chotalal Hirachand* v. *Manilal Gagalbhai*[1]. We also rely on *Harvey* v. *Walters*[2].

The injunction regarding the window and apertures should not stand. The parties are Dheds (scavengers) and not entitled to the right of privacy with respect to their houses without alleging and strictly proving the custom of privacy. No such custom was alleged and proved. The finding also is very halting. The openings command a view of the open courtyard and the male apartments of the house No right of privacy could be claimed with respect to these *Keshar Harkha* v. *Ganpat Hirachand*[3]. *Shrinivas Udpirav* v. *L. Reid*[4]. The ruling in *Manishankar Hargovan* v. *Trikam Narsi*[5] is not applicable and the privilege should not be extended any further

G. K. Parekh, for the respondent (plaintiff).—The finding as to the eaves is a finding of fact and cannot be disturbed in second appeal. The District Judge did not merely proceed upon the assumption that the projection was an encroachment. Even if he did, we submit that he was right A new column of space is now occupied by the eaves The burden on the servient tenement would be increased by the roof being raised. Besides it is not found that the eaves are meant for rain-water.

As regards the window and apertures both the lower Courts found that our right of privacy is invaded. The right of privacy is recognized in Gujarat by custom: *Manishankar Hargovan* v. *Trikam Narsi*[5]. It was not necessary to allege and prove it. The window and

(1) (1913) 37 Bom 491.
(2) (1873) L R 8 C P. 162
(3) (1871) 8 Bom. H. C. R (A C.J) 87
(4) (1872) 9 Bom. H. C. R 266
(5) (1867) 5 Bom H. C. R (A C J) 42

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apertures do overlook our windows and the *khadki* which is used by females. The finding is binding in second appeal. Besides the injunction as regards the window and apertures our claim is also based on the agreement which was arrived at between the parties and which is relied on by the Courts.

Thakore, in reply.—There was no reference to the agreement in the plaint. There could be no privacy as to the courtyard. Admittedly there are tenants in the plaintiff's house.

SCOTT, C. J. :—There are two questions on which the parties are at issue in this appeal. The first is whether the defendant who at a previous time had his eaves projecting ten inches over the plaintiff's land (and so far as we can judge he had uninterrupted enjoyment of them for twenty-five years) should be interfered with when he raises the wall of his house and projects the eaves to the same extent at a correspondingly increased height. The learned District Judge has held that except in the case of the discharge of water from the eaves the nature of the interference with the right of the servient tenement is trespass and not within the law relating to easements. We are unable to agree with his opinion upon that point. It appears to us that the definition of 'easement' in the Easements Act applies just as much to a projection of eaves in a dry country where there is no discharge of rain-water as in a country where there is an abundant rainfall and there is discharge of water. It is to be observed, moreover, that in Ahmedabad there is often an abundant rainfall, and the eaves must be used in the ordinary course for the discharge of rain-water. The case falls within the decision of this Court in *Chotalal Hirachand* v. *Manilal Gagalbhai*[1]. If the defendant has acquired an easement from a projection

[1] (1913) 37 Bom. 491.

of eaves ten inches over the plaintiff's land, he can raise the height of those eaves so long as he does not throw an increased burden upon the servient tenement. That is provided by section 23 of the Easements Act: see also *Harvey* v. *Walters*[1].

We understand the learned District Judge's finding, that the defendant has projected his eaves beyond their former limit, to be based upon his proposition of law that the defendant cannot project his eaves at all at a different height to that at which they were originally projected. The decree of the District Judge, therefore, must be modified in respect of the eaves.

The second point is based upon a customary easement which is alleged to be in force throughout Gujarat. Customary easements are recognized under the Easements Act, section 18. It was stated in *Manishankar Hargovan* v. *Trikam Narsi*[2], that "A series of decisions, extending over a long number of years, has settled the question, that, in accordance with the usage of Gujarat, a man may not open new doors and windows in his house, or make any new apertures, or enlarge old ones, in a way which shall enable him to overlook those partitions of his neighbour's premises which are ordinarily secluded from observation, and in this manner to intrude upon that neighbour's privacy; and that an invasion of privacy is an infraction of a right, for which the person injured has a remedy at law". The decisions which are quoted in support of that proposition do not entirely bear it out. For example, one of the cases quoted is *Syed Imambuksh* v. *Guggul Purbhoodas*[3], decided in 1862, where the plaintiff sued to cause an eyelet made in the back-wall of the defendant's house to be blocked up as destroying the privacy of his

(1) (1873) L. R. 8 C. P. 162. (2) (1867) 5 Bom. H. C. R. (A C J) 41.
(3) (1862) 9 Harington 274.

premises. The defendant pleaded that the opening was not recent and that the plaintiff did not suffer any inconvenience from it. It was alleged by the plaintiff that the opening could be used in order to look into his privy. The learned Assistant Judge, however, did not consider that the plaintiff suffered any material inconvenience from his yard being commanded by the eyelet, and the Sadar Diwani Adawlut accepting the finding of the Assistant Judge confirmed his decree with costs. That is the most recent case to be found in the Reports prior to the decision in *Manishankar Hargovan* v. *Trikam Narsi*[1]. Then in *Keshav Harkha* v. *Ganpat Hirachand*[2], in a second appeal, Melvill and Kemball, JJ., after referring to the dictum in 5 Bom. H. C. Reports, said "We are certainly not disposed to extend the privilege further than it was carried in that case; and as it appears from the Assistant Judge's judgment in the present case that the window opened by the defendant looks, not into the plaintiff's private apartments, but into an open courtyard outside his house, we are of opinion that there has been no invasion of the plaintiff's privacy which will entitle him to have the window closed." Here the finding of the lower Court is that "the *jalis* and windows in the back-wall of the defendant's house command a *khadki* or courtyard which is a place which can be used for females to bathe and similar purposes of privacy, and the defendant admits that from his present window people sleeping in plaintiff's house can be seen, and the *jalis* are no doubt above a man's height but if one were inclined to peep through the same he can peep straight into the plaintiff's house—the male apartment next to the *osari*. Even if he were to peep into the *khadki* of the plaintiff's house the privacy of his people and that of his tenants would be disturbed". If the case rested there

(1) (1867) 5 Bom. H. C. R. (A.C.J.) 42. (2) (1871) 8 Bom. H. C.R. (A.C.J.) 87.

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we should hesitate to hold that the plaintiff was upon these findings entitled to relief having regard to the decision in *Syed Imambuksh* v. *Guggul Purbhoodas*[1] and in *Keshav Harkha* v. *Ganpat Hirachand*[2]. But there was an agreement between the parties reduced to writing in April 1879, in which it was agreed by the defendant's father that he would not make any opening in his back-wall. The wall in which these *jalis* and windows, which are complained of, are opened, is a continuous back-wall with the back-wall in existence at the date of the agreement of 1879. Having regard to that agreement we cannot interfere with the decision of the lower Courts requiring the defendant to close up the *jalis* and windows which he has opened in his back-wall.

We, therefore, vary the decree of the District Judge by deleting the injunction against the construction of the eaves of the new roof so as to project over the land of the plaintiff. It must be understood that this variance of the District Judge's decree in no way authorizes the defendant to project his eaves more than ten inches over the plaintiff's property. Plaintiff must have the costs which are incidental to the institution of the suit. As to all other costs each party must bear his own.

Decree varied.

G. B. R.

(1) (1862) 9 Harrington 274.

(2) (1871) 8 Bom. H.C R. (A C.J.) 87.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Beaman

1913. *July 4.*

GIRDHARLAL PRAYAGDATT (ORIGINAL DEFENDANT), APPELLANT, *v.* MANIKAMMA KOM NARAYANSWAMI (ORIGINAL PLAINTIFF), RESPONDENT, AND GIRDHARLAL PRAYAGDATT (ORIGINAL DEFENDANT), APPELLANT, *v* YASHODABAI BHRATAR DAMODARPANT PHATAK (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Suit to recover the amount due—Defendant's plea that the mortgage was effected to defraud his creditor—Attachment of the property by the creditor—Order for sale subject to the mortgage—Creditor paid off before sale—Decree for plaintiff on the ground that defendant cannot plead his own fraud—Fraud not carried out—Defendant's intention not punishable.

The plaintiff sued to recover from the defendant the amount due under a mortgage The defendant pleaded that the mortgage deed was effected to protect his property from his creditor and that no consideration really passed under the deed. Previous to the suit the defendant's creditor had attached the mortgaged property and the mortgagee (present plaintiff) had made a claim on the basis of the mortgage for the release of the property from attachment The mortgagor (present defendant) admitted the mortgage and the property was ordered to be sold subject to the mortgage But the property was, however, not sold because the mortgagor paid off his creditor before the order for sale was carried into effect

Both the lower Courts decreed the claim on the ground that the defendant could not be allowed to defeat the plaintiff by pleading his own fraud

On second appeal by the defendant —

Held setting aside the decree, that as the defendant's creditor had not been defrauded there was no reason why the Court should punish his intention to defraud by passing a decree against him

Sidlingappa v *Hirasa*[1], explained and distinguished

Ram Surun Singh v *Mussamut Pran Peary*[2], referred to

SECOND appeals against the decision of A. W. Varley, Assistant Judge, and that of E. H. Leggatt, District Judge of Dharwar, confirming the decrees passed by

* Second Appeals Nos 532 and 830 of 1912.

[1] (1907) 31 Bom 405 [2] (1870) 13 Moo. I. A. 551.

V. V. Wagh, Joint Subordinate Judge of Dharwar in two suits Nos. 491 and 492 of 1909.

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Two plaintiffs instituted two suits against the defendant to recover the amount due to them under two mortgage deeds. One mortgage was dated the 31st March 1885 and was for Rs. 1,000 and the other was dated the 13th July 1885 and was for Rs. 1,500.

The defence to both the suits was one and the same. The defendant pleaded that the mortgages were passed with the intention of protecting his property from his creditor Rajesaheb and that he received no consideration under the deeds.

Subsequent to the mortgages the defendant's creditor Rejesaheb attached the mortgaged property in execution of his decree against the defendant. The mortgagees intervened and applied for the removal of the attachment on the strength of the mortgage deeds admitted by the mortgagor and the Court ordered that the property should be sold subject to the mortgages. The property, however, was not sold as the defendant paid off his creditor before the date fixed for the sale.

The Subordinate Judge relying on the decision in *Sidlingappa* v. *Hirasa*[1] found that the defendant could not be allowed to raise the plea that the mortgages were colourable transactions passed to protect the property from his creditor Rajesaheb. He, therefore, decreed the claims in both the suits.

The defendant filed two appeals, Nos. 71 and 72, in the District Court at Dharwar and in both appeals the decrees of the Subordinate Judge were confirmed.

The defendant, thereupon, preferred two second appeals.

S. V. Palekar for the appellant (defendant) :—It was wrong to hold that we could not raise the plea that

(1) (1907) 31 Bom. 405.

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the mortgages were colourable transactions made for the purpose of saving the property from our creditor. Our admission of the mortgage in the previous miscellaneous proceeding cannot estop us from pleading that no consideration passed to us under the deeds: *Ram Surun Singh* v. *Mussamut Pran Peary*[1].

V. V. Bhadkamkar, for the respondent (one of the plaintiffs):—When fraud has been actually carried into effect, it is not open to a party to the fraud to contend that the deed was hollow. He cannot plead his own fraud: *Sidlingappa* v. *Hirasa*[2], *Govinda Kuar* v. *Lala Kishun Prosad*[3], *Sham Lall Mitra* v. *Amarendro Nath Bose*[4], *Juggernath Augurwallah* v. *E. A. Smith and Co.*[5]

In the previous execution proceeding, the defendant admitted the mortgage transactions and succeeded in getting an order from the Court that the property be sold subject to the mortgages. The fraud was thus actually carried into effect.

[Beaman, J. —Was the property actually put to sale?]

No. The allegation is that the creditor was paid off before the date of the sale. But there was no specific issue on the point nor any proof of payment. The payment, even if proved, cannot avail the defendant because the Court which ordered the sale was led to believe that the mortgages were genuine transactions and there was the completion of fraud.

K. H. Kelkar, for the respondent (the other plaintiff).

SCOTT, C. J.:—These appeals are preferred in two suits filed by different plaintiffs in the Court of the Subordinate Judge at Dharwar on the 22nd of October 1909. In the first suit, the plaintiff sued to recover

(1) (1870) 13 Moo. I. A. 551
(2) (1907) 31 Bom. 405
(3) (1900) 28 Cal. 370.
(4) (1895) 23 Cal. 460.
(5) (1906) 33 Cal. 547.

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the amount due upon a mortgage dated the 31st of March 1885, the mortgage having been executed by the defendant in favour of the plaintiff's husband. In the second suit, the plaintiff sued to recover the amount due upon a mortgage of the 31st of July 1885, the mortgage having been executed by the defendant in favour of the plaintiff's father. The defendant in each case is in possession of the mortgage property, and in each case the defence is the same, namely, that the mortgage deed was passed in order to protect the property from the defendant's creditor Rajesaheb. The defendant in his evidence stated that the considerations for the two deeds were received in the Registration Office and repaid to the mortgagees outside the office. The properties were attached by the creditor Rajesaheb, and the mortgagees then made claims on the basis of the deeds for release of the property from attachment. The mortgagor admitted the claims and the Court ordered that the property should be sold subject to the mortgages abovementioned. The properties were, however, not sold because the defendant paid off the creditor Rajesaheb before the orders for the sales were carried into effect.

The learned Judges in the lower Courts have held that the case of the defendant is on all fours with that of the defendant in *Sidlingappa* v. *Hirasa*[1] and therefore he cannot be allowed to defeat the plaintiff's claim by pleading his own fraud. The most obvious distinction between the present cases and that relied upon by the learned Judges is that the creditor Rajesaheb has not been defrauded. As observed in Mayne's Hindu Law, paragraph 446 (6th Edn.), " if .. he has not defrauded anyone, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own." There is

[1] (1907) 31 Bom. 405.

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another distinction also between the present case and *Sidlingappa's*[1], and that is, that the plaintiff in each of these cases is seeking to enforce his contract for payment of money under his mortgage deed, and that point of distinction was referred to by Sir Lawrence Jenkins in *Sidlingappa's*[1] case where he said: "the defendant is not resisting the enforcement of a contract, but is invoking the aid of the Court to enable him to escape on the strength of his own fraud from the consequences of sale-deeds which ostensibly create a valid title in the plaintiff." It is to be observed that the authorities relied upon in that case were authorities which were not concerned with the relations of mortgagor and mortgagee. Where those relations exist the considerations stated in the judgment of the Privy Council in *Ram Surun Singh* v. *Mussamut Pran Peary*[2] must apply, subject to the dominant principle that where the fraud has actually been carried into effect the estate must lie where it falls. We, therefore, set aside the decrees of the lower Courts and remand the case for decision on the merits.

Costs, costs in the cause.

BEAMAN, J.—As I was a party to the judgment in *Sidlingappa* v. *Hirasa*[1], I may be allowed to add that while still adhering to the principle of that judgment, I do not think that within the proper limits of its application it need be brought in question here. I agree with my Lord the Chief Justice that this case can be distinguished. Here the claim appears to lie in contract and in contract still executory so that it is difficult to see how, if the contract be in reality illegal, it could be enforced at all in the plaintiff's favour, or why, if not illegal, the defendant should not be allowed in ordinary course to show that he received no consideration. But I think that a still

[1] (1907) 31 Bom. 405. [2] (1870) 13 Moo I. A. 551.

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broader ground of distinction is that in this case, as found by the Courts below, no fraud was actually effectuated, and that is really the basis of the decision, as I understood it at the time, given by Jenkins C. J., in *Sidlingappa's*[1] case. Upon all the other points of distinction set forth in my Lord the Chief Justice's judgment just delivered I entirely agree.

Decrees set aside.

G. B. R.

[1] (1907) 31 Bom 405

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr Justice Heaton

1913 *July* 11.

DAKORE TOWN MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT, *v* TRAVEDI ANUPRAM HARIBHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

District Municipal Act (Bombay Act III of 1901), sections 113 and 122—Suit against Municipality for re-instating a stone removed by it—Plaintiff's adverse possession—Municipality creature of the statute—Duties of Municipality—Municipal District—Encroachment—Obstruction to safe and convenient passage—Notice of removal—Justification by reference to statutory powers.

In a suit brought against a Municipality to restrain them from obstructing the plaintiff in re-instating a stone which was imbedded in his *otla* in its original position, the lower appellate Court found that the stone had been *in situ* for twelve years, therefore the Municipality had no right to interfere with it as there had been adverse possession for the statutory period of the portion of the street occupied by the stone.

On second appeal by the Municipality,

Held, that the Municipality was the creature of the Statute with duties *inter alia* to preserve the passage along public streets It mattered not for the Municipality whether the encroachment had been in existence for 12 years or more. Under section 113 of the District Municipal Act (Bom Act III of 1901) the Municipality might, on proof that the encroachment objected to was an obstruction to the safe and convenient passage along a street, by written notice require the owner to remove it. Section 122 of the Act empowered the

* Second Appeal No. 211 of 1913

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Municipality to remove the encroachment which might have been put up after the place had become a Municipal District.

In the present case the Municipality having failed to justify their action by reference to the said statutory powers, the decree was confirmed.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, reversing the decree of M. I. Kadri, Subordinate Judge of Umreth.

This action was instituted by the plaintiff for a perpetual injunction restraining the defendant Municipality from obstructing him in putting the stone in suit in its original position in the *otla* of his house and for damages to the extent of Rs. 2 for unlawful removal of the stone. The plaint alleged that the stone in suit was included in plaintiff's *otla* and had been there since time immemorial and that nevertheless it was removed by the Municipality.

The defendant Municipality answered that the stone was a new erection and was put in the public road. It was, therefore, properly removed.

The Subordinate Judge found that the stone had not been there for 12 years and that it was not part of the plaintiff's *otla*. He, therefore, dismissed the suit.

On appeal by the plaintiff, the District Judge reversed the decree and granted the relief prayed for by the plaintiff on the ground "that the stone has been *in situ* for over 12 years and that the land under it was not public land. * * *"

The defendant preferred a second appeal.

M. K. Mehta, for the appellant (defendant):—The lower Court found that a part of the stone projected from the limits of the *otla* into the direction of the public road, therefore, the suit should have been dismissed. The limitation of 12 years is not applicable and no period of limitation would come in the way of the Municipality exercising its powers under section 122 of the District

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Municipal Act. If any article of the Limitation Act applied it would be article 146 A which gives the Municipality a period of 30 years. We rely on *S. Sundaram Ayyar* v. *The Municipal Council of Madura*[1].

Further the finding that the stone has been *in situ* for 12 years is bad in law. The lower Court found that practically there was no evidence on the point. The onus lay on the plaintiff to adduce evidence and there being no evidence the suit should have been dismissed.

G. N. Thakore, for the respondent (plaintiff) was not called upon.

SCOTT, C. J.:—In this case the plaintiff has obtained an injunction against the Dakore Municipality to restrain them from obstructing him in re-instating a stone which was formerly imbedded in his *otla* in its original position and Rs. 2 for damages for wrongful removal of the stone. The learned Judge has based his decision upon a finding that this stone had been *in situ* for twelve years, and that, therefore, the Municipality had no right to interfere with it as there had been adverse possession for the statutory period of the portion of the street occupied by the stone. We do not think that this is a good reason for the decision. The Municipality is the creature of the Statute with duties *inter alia* to preserve the passage along public streets, and, under sections 113 and 122 of the District Municipal Act, it is given certain powers depending upon the existence of certain conditions for the removal of encroachments or obstructions upon the streets. Under section 113, if it is proved that the encroachment objected to is an obstruction to the safe and convenient passage along a street, the Municipality may by written notice require the owner to remove it. Under section 122, the Municipality have power to remove an encroachment which may have been set up

(1) (1901) 25 Mad. 635.

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after the place has become a Municipal district. It matters not in either case whether the encroachment has been in existence for twelve years or more, but the statutory conditions regulating the exercise of the power must be shown to exist. The Municipality in the present case have not shown either that the stone which they have removed was an obstruction to the safe and convenient passage along the street or that the stone was set up by the plaintiff after the place became a Municipal district. They have, therefore, not *justified their action by reference to their statutory* powers. On that ground we affirm the decree of the lower appellate Court and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Heaton and Mr. Justice Macleod.

1913. *July 16.*

SAWANTRAVA KOM FAKIRAPPA (ORIGINAL PLAINTIFF), APPELLANT, v. GIRIAPPA FAKIRAPPA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 2 (2), 10A† — Evidence Act (I of 1872), section 92—Agriculturist—Mortgage in form of sale—Redemption suit—Intention of the parties at the time of the transaction

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* First Appeal No. 272 of 1912.

† Sections 2 (2), 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) are as follows :—

2. (2nd) In Chapters II, III, IV and VI and in section 69, the term "agriculturist," when used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law.

The object of section 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is to enable a party to the suit to prove, notwithstanding the words of the document, what the real intention was at the time when the document was executed. Regard must be paid to the date of the transaction and an agriculturist can only be allowed, according to the provisions of section 10A, to enjoy the special benefit of the favoured class in disregarding the provisions of section 92 of the Evidence Act (I of 1872), if he belonged to the favoured class as defined by the statute at the date of the transaction

FIRST appeal against decision of G. V. Patvardhan, First Class Subordinate Judge at Dharwar, in Suit No. 116 of 1912.

This action was instituted by the plaintiff to redeem the lands in suit on the allegation that the document sued on, though in the form of a sale, was really a mortgage, and he prayed that accounts be taken under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The defendants contended that the transaction in suit was a sale out-and-out and that the plaintiff was not

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10A. Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this Chapter, the Court shall, notwithstanding anything contained in section 92 of the Indian Evidence Act, 1872, or in any other law for the time being in force, have power to inquire into and determine the real nature of such transaction and decide such suit or proceeding in accordance with such determination and shall be at liberty, notwithstanding anything contained in any law as aforesaid, to admit evidence of any oral agreement or statement with a view to such determination and decision:

Provided that such agriculturist or the person, if any, through whom he claims was an agriculturist at the time of such transaction.

Provided further that nothing in this section shall be deemed to apply to any suit to which a *bonâ fide* transferee for value without notice of the real nature of such transaction or his representative is a party where such transferee or representative holds under a registered deed executed more than twelve years before the institution of such suit.

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entitled to the benefit of the Dekkhan Agriculturists' Relief Act.

The transaction in suit was entered by the plaintiff's deceased husband on the 27th November 1899, and the provisions of the Dekkhan Agriculturists' Relief Act were extended to the Dharwar District in 1905.

The Subordinate Judge framed a preliminary issue and found that the suit was not maintainable under section 10A of the Dekkhan Agriculturists' Relief Act. He, therefore, dismissed the suit, observing :—

Plaintiff claims through her husband, the original mortgagor, who cannot be said to have been an agriculturist at the time of the transaction, *viz* in 1899, when the Dekkhan Agriculturists' Relief Act had not been extended to this District (*vide* section 2 of the Dekkhan Agriculturists' Relief Act and 11 Bom L R, pages 1288 and 721) Section 10A provides that the plaintiff or the person through whom he claims must be an agriculturist at the date of the transaction.

The plaintiff appealed

Jayakar, with *G. S. Mulgaonkar*, for the appellant (plaintiff) :—There is a difference in the wording of the proviso to section 10A of the Dekkhan Agriculturists' Relief Act when compared with section 2 (*2*). The words "then defined by law" occurring in the latter are not to be found in the former. Prior to the enactment of section 10A it was enough to show that the person was an agriculturist at the date of the suit.

The ruling in *Balkishen Das* v. *Legge*[1] demonstrated that some remedial measure was necessary to relieve the strictness of the rule followed in the case. Section 10A is of a remedial character for those who would take the benefit of the Act. The word "agriculturist" means a person who is an agriculturist at the date of the suit : *Gopal Ghela* v. *Rajaram Amtha*[2]. In this case section

[1] (1899) 22 All. 149

[2] (1911) 36 Bom 305

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10A was applied to a transaction dated 1879; see also *Shankar Ramkrishna* v. *Krishnaji Ganesh*[1] and *Mahadev* v. *Vinayak*[2].

Further, section 10A being a remedial measure should be liberally construed, whereas section 2 (2) being a protective measure should receive a strict construction: Maxwell on Statutes, pp. 124, 367.

To say that unless a person is an agriculturist at the date of the transaction he will not receive the benefit of section 10A is entirely inconsistent with the remedial nature of the section.

The following cases were referred to:—

Javanmal Jitmal v *Muktabai*[3]; *Shivram Udaram* v. *Kondiba Muktaji*[4]; *Pannalal* v. *Kalu*[5] and *Fatmabibi* v. *Ganesh*[6]

K. H. Kelkar for respondent 1 (defendant 1) not called upon.

Campbell, with *A. G. Desai*, for respondents 2 and 3 (defendants 2 and 3) not called upon.

S. V. Palekar for respondent 4 (defendant 4) not called upon.

SCOTT, C J.:—This suit was instituted by the plaintiff for redemption of certain property, which, she alleged, had been mortgaged by her husband to the defendants by a document, which, though in form a sale, was in reality a mortgage. In order to prove that she was a mortgagor it would be necessary for her to give evidence of the intention of the parties at the time of the transaction, namely, in the year 1899, and to show that that intention was not expressed in the deed. This

(1) (1909) 34 Bom 161
(2) (1909) 33 Bom 504
(3) (1890) 14 Bom 516
(4) (1884) 8 Bom. 340 at p 345
(5) (1906) 8 Bom L. R. 798
(6) (1907) 31 Bom. 630.

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she could not do under the provisions of section 92 of the Indian Evidence Act. But if she was enabled to avail herself of the provisions of section 10A of the Dekkhan Agriculturists' Relief Act she could give the proof that she desired.

The suit was brought in the Dharwar District to which the provisions of the Dekkhan Agriculturists' Relief Act were extended in the year 1905. Section 10A enables the Court to inquire into the real nature of the transaction in issue, provided that the agriculturist, who was a party to the suit claiming the benefit of the Act, was an agriculturist at the time of the transaction (in this case in the year 1899). It is argued that "agriculturist" in the proviso to section 10A must not be read by the light of the statutory definition, but must be interpreted in the general and popular sense, and that in that sense the mortgagor was earning a living by agriculture, and therefore falls within the proviso.

The difficulty is that section 2 is peremptory. It provides that in construing this Act, unless there is something repugnant in the subject or context, the following rule should be observed, namely, "agriculturist" shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend, or who ordinarily engages personally in agricultural labour within those limits.

It has been argued that if the statutory definition is applied to the proviso to section 10A we shall have a result repugnant to the object of the section. That does not appear to us to be the case. The object of the section is to enable a party to the suit to prove, notwithstanding the words of the document, what the real intention was at the time when the document was

executed. Therefore, one must have regard to the date of the transaction, and he can only be allowed according to the provisions of section 10A to enjoy the special benefit of the favoured class in disregarding the provisions of section 92 of the Indian Evidence Act, if he belonged to the favoured class as defined by the Statute at the date of transaction. Therefore, in my opinion, the decision of the Subordinate Judge was correct and this appeal should be dismissed with costs. The case of *Gopal Ghela* v. *Rajaram Amtha*[1] is cited as showing that this Court has applied the provisions of section 10A to a transaction dated the 15th of June 1869 in the Broach District, to which the provisions of section 10A were only extended in January 1911, and to which the provisions of the Dekkhan Agriculturists' Relief Act were only extended long subsequent to 1869. We have good reason to believe that this proviso to section 10A was not brought to the notice of the Court at the time of the hearing of that case, and the judgment itself indicates that no point was based upon the proviso, for there is no reference to it throughout the judgment.

HEATON, J. :—I concur.

MACLEOD, J. :—I concur.

Appeal dismissed.

G. B. R.

[1] (1911) 36 Bom. 305.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah

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SHANKAR VENKATESH KARGUPPI AND ANOTHER (ORIGINAL DEFENDANTS NOS 8 AND 9), APPELLANTS, v SADASHIV MAHADJI KULKARNI (ORIGINAL PLAINTIFF), RESPONDENT.°

Mortgage—Prior and subsequent mortgagees—Suit on prior mortgage to which the subsequent mortgagee not a party—Subsequent mortgagee obtaining decree on his mortgage in absence of first mortgagee—Sale of property subject to first mortgage—Subsequent mortgagee purchasing property with permission of Court—Execution of decree by first mortgagee—Subsequent mortgagee can ask the mortgage amount of first mortgage to be determined again—By purchase subsequent mortgagee does not lose his rights under his mortgage—Extinguishment of mortgage—Transfer of Property Act (IV of 1882), section 101.

In 1886, certain property was mortgaged to V. It was again mortgaged by the same mortgagors to H in 1887 In 1892, V obtained a decree on his mortgage H was not made a party to the suit. V having sold his rights, his assignee K obtained another decree in 1896 against the mortgagors on the mortgage and other debts To this suit also H was not a party. In 1895, H sued on his own mortgage without making the first mortgagee a party A decree was passed in terms of an award The property was sold in execution of the decree subject to the first mortgage and was purchased by H with the permission of the Court In 1908, the decree-holder applied to execute the decree of 1896 H was made a party to the execution proceedings. It was contended by H that he was not bound by the decree under execution and was entitled to have the mortgage amount determined again in the execution proceedings The decree-holder urged that H's mortgage had been extinguished by his purchase at the Court sale, and as such purchaser he was bound by the decree by which the original mortgagors were bound at the date of the auction-sale, and that H did nothing to show that he intended to keep alive his mortgage.

Held, that as a second mortgagee H was entitled to redeem the first mortgage, and to have the amount of the first mortgage determined again as between himself and the first mortgagee.

Held, further, that as auction-purchaser H became entitled to all the rights which the mortgagors and the mortgagee had at the date of the sale, *i.e.*, to all the rights of the mortgagors as they existed at the date of the mortgage upon which the decree was based.

° First Appeal No 237 of 1912.

Held, also, that H must be presumed to have intended to keep his mortgage alive, as it was clearly for his benefit to do so

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APPEAL from the decision of G. N. Kelkar, First Class Subordinate Judge at Belgaum.

Execution proceedings.

In 1886, the property in dispute was mortgaged by Venkatesh to Vithalrao It was again mortgaged by Venkatesh to Huchrao in 1887. In 1892, Vithalrao sued on his mortgage without making Huchrao a party to the suit; and obtained a decree on an award. Shortly afterwards he sold his rights to Kanburgikars, represented by the plaintiff. In 1896, Kanburgikars obtained another decree, also based on an award, for the mortgage-debt of 1896 and other debt. To this suit, Huchrao was not a party. In 1895 Huchrao sued on his own mortgage without making the first mortgagee a party. A decree was passed in the suit. In execution of the decree the property was sold subject to the first mortgage of 1886; and was purchased by Huchrao with the permission of the Court in 1898. Huchrao sold his own rights to Karguppikars (defendants). In 1908, the decree-holder applied to execute the decree of 1896 by sale of the property. Both Huchrao and his assignee were made parties to the execution proceedings. It was contended by Huchrao that he was not bound by the first decree to which he was no party; that he was entitled to redeem the first mortgage; and that he was entitled to have the amount of the first mortgage determined again.

The Subordinate Judge overruled this contention and held that both Huchrao and his assignee were bound by the decree to the extent of the property in their hands.

The defendants Nos. 8 and 9, assignees of Huchrao, appealed to the High Court.

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K. H. Kelkar, for the appellant:—Huchrao was neither a party to the decree of 1892 nor to the decree of 1896. We are not bound by those decrees and are entitled to have the account of the first mortgage taken over again. See *Pandurang* v. *Sakharchand*[1]; *Debendra Narain Roy* v. *Ramtaran Banerjee*[2]; *Ram Churn Sing* v. *Dhaturi Sing*[3]; and *Ram Narain Sahoo* v. *Bandi Pershad*[4]. A purchaser at an auction-sale becomes the owner not only of the mortgagor's rights but also of those of the mortgagee. See *Maganlal* v. *Shakra Girdhar*[5]

C. A. Rele, for the respondent:—The appellant is not a puisne mortgagee. He is bound by the decree by which the original mortgagors were bound at the date of the auction-sale. Huchrao's rights as second mortgagee were extinguished, having purchased the property at the auction-sale. See *Ramkrishna Sadashiv* v. *Chothmal*[6]. Section 74 of the Transfer of Property Act does not apply, but the doctrine of merger (section 101) applies. Huchrao has done nothing to show that he intended to keep his mortgage alive.

Kelkar, in reply.

Cur. adv. vult.

SHAH, J. :—This is an appeal arising out of certain execution-proceedings under the following circumstances.—Certain properties were mortgaged by Venkatesh and others to Vithalrao in 1886. They were mortgaged again to Rao Bahadur Huchrao in 1887 by the same mortgagors. In 1892 Vithalrao obtained a decree on an award on his mortgage against the mortgagors to which decree Huchrao was not a party, and subsequently in the same year he assigned his rights to the

(1) (1906) 31 Bom. 112
(2) (1903) 30 Cal 599
(3) (1890) 18 Cal 146.
(4) (1904) 31 Cal. 737.
(5) (1897) 22 Bom 945
(6) (1888) 13 Bom 348.

Kanbargikars, who are now represented by the present plaintiff (decree-holder). In 1896 the Kanbargikars obtained a fresh decree against the mortgagors for the mortgage-debt of 1886 and for other debts, which the mortgagors owed to them, in respect of the lands mortgaged in 1886 and some other lands This also was a decree on an award and Huchrao was not a party to it. In 1895 R. B. Huchrao got a decree against the mortgagors on his second mortgage directing the sale of the mortgaged property subject to the first mortgage of 1886 in favour of Vithalrao. The first mortgagee and his assigns were not joined as parties to this suit by Huchrao. In execution of his decree Huchrao, with the permission of the Court, himself purchased the property subject to the first mortgage of 1886, at a Court-sale in or after 1898. Huchrao sold his rights as auction-purchaser to the Karguppikars in 1911.

The decree-holder applied in 1908 to execute the decree obtained on an award in 1896 against the mortgagors, and to bring to sale all the properties—including the properties which were mortgaged to Vithalrao in 1886 and again to Huchrao in 1887. The application was made in the first instance against the mortgagors or their legal representatives. Subsequently on the decree-holder's application Huchrao and the Karguppikars were joined as defendants Nos. 7, 8 and 9 respectively in the present execution-proceedings.

The facts as stated above are admitted by both the parties. In the lower Court several issues were raised. But the controversy in this appeal is confined to issues Nos. 11 and 14. The lower Court *held that Huchrao* and the Karguppikars were necessary parties to these proceedings, and that they were bound by the decree under execution though they were not parties to it. In the appeal, which has been preferred by defendants 8 and 9 (the Karguppikars) against the order made by the

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lower Court on the basis of the above findings, the correctness of the findings on both the issues is questioned.

It is contended on behalf of the appellants that they are not bound by the decree but that they are entitled to redeem the first mortgage in favour of Vithalrao and to have the mortgage amount determined again. So far as the appellants' right to redeem the mortgage of 1886 is concerned, the decree-holder does not contest it. The real point in dispute between the parties is whether or not the present appellants are bound by the decree under execution.

The appellants have got all the rights which Huchrâo had and if Huchrao would not be bound by the decree the appellants clearly would not be bound by it. It is necessary, therefore, to consider Huchrao's rights. We think that Huchrao not being a party to the decree is not bound by it. Huchrao as a second mortgagee could have been and should have been joined as a party to the decree of 1892 as well as to the decree of 1896. But he was not so joined. Considering Huchrao's position simply as a second mortgagee, we think it is clear, that he would be entitled to redeem the first mortgage and would not be bound by any adjudication as to the mortgage amount between the mortgagors and the first mortgagee. While redeeming the first mortgage he would be entitled to have the mortgage amount determined again as between himself and the first mortgagee. This appears to us to be a necessary consequence of the second mortgagee not being made a party to the suit between the mortgagors and the first mortgagee.

In the case of *Umes Chunder Sircar* v. *Mussummat Zahoor Fatima*[1], their Lordships observe that "Persons who have taken transfers of property subject to a mortgage

[1] (1890) L. R. 17 I. A. 201 at p. 212

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cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor, to which they are never made parties". The cases of *Thenappa Chettiar* v. *Marimuthu Nadan*[1] and of *Debendra Narain Roy* v. *Ramtaran Banerjee*[2] also support the same view.

We have so far considered the position of Huchrao as a second mortgagee. In the absence of anything more, the decree could not be binding upon Huchrao. But it is argued on behalf of the plaintiff (decree-holder) that because Huchrao obtained a decree on his mortgage, had the property sold in execution, and purchased it himself at the auction-sale, his right as second mortgagee has been extinguished and that as a purchaser he is bound by the decrees by which the original mortgagors were bound at the date of the auction-sale. In our opinion this contention is based upon a misconception of the auction-purchaser's position in the case of a mortgage-decree. In a number of decisions of this Court it has been held that the purchaser at an auction-sale becomes the owner not only of the mortgagor's rights but also of the mortgagee's rights or in other words the purchaser becomes entitled to all the rights of the mortgagor as existing at the date of the mortgage: see *Kheraj Jusrup* v *Lingaya*[3], *Dadoba Arjunji* v. *Damodar Raghunath*[4], and *Maganlal* v. *Shakra Girdhar*[5]. If this rule is applied to the present case, it is clear that as auction-purchaser Huchrao became entitled to all the rights which the mortgagors and the mortgagee had at the date of the sale, *i. e.*, to all the rights of the mortgagors as they existed at the date of the mortgage, upon which the decree was based. Thus by the purchase Huchrao obtained some additional right,

[1] (1908) 31 Mad. 258.
[2] (1903) 30 Cal. 599.
[3] (1873) 5 Bom. 2.
[4] (1891) 16 Bom. 486.
[5] (1897) 22 Bom. 945.

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but there was no derogation from any of the rights, which he possessed as second mortgagee before the sale. It has been urged that when the purchaser is the mortgagee himself, the rights of the mortgagee become extinguished. and the purchaser gets only the mortgagor's rights. We think that the circumstance that the purchaser is the mortgagee himself and not a third person makes no difference in the result, so far as the present point is concerned. Huchrao as auction-purchaser got all the rights which a stranger would have got as a purchaser and nothing less. As observed by their Lordships of the Judicial Committee in *Mahabir Pershad Singh* v. *Macnaghten*[1], "Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser". It is not denied in this case that Huchrao purchased the property after obtaining leave to bid.

It is further urged that Huchrao did nothing to show that he intended to keep alive his mortgage. We do not think that it was necessary for him to do anything to keep the rights alive. By virtue of the purchase, he got certain rights as purchaser which include the rights of the mortgagee. His rights as second mortgagee are not directly asserted as such but as having passed to Huchrao the purchaser. To the state of facts, such as we have, neither section 101 of the Transfer of Property Act nor the principle underlying that section has any application. Assuming, however, that the section or the principle thereof applies, it is clear that under section 101 of the Transfer of Property Act the incumbrance was not extinguished, as it was clearly for the benefit of Huchrao to continue it. Even apart from section 101 of the Transfer of Property Act, the result would be the same. It is a well established rule that a

(1) (1889) L. R. 16 I. A. 107 at p. 114.

Court should presume in the absence of any evidence to the contrary that the incumbrancer intends to keep the incumbrance on foot, when it is for his benefit to do so. In the present case Huchrao must be presumed to have intended to keep it alive, as it was clearly for his benefit to do so. See *Gokuldoss Gopaldoss* v. *Rambux Seochand*[1] and *Thorne* v *Cann*[2]. We, therefore, hold that Huchrao as second mortgagee was entitled to redeem the first mortgage, that as purchaser at the Court-sale in execution of the decree on his mortgage he got that right, that he is not bound by the decree under execution, and that the Karguppikars as claiming under him are entitled to redeem the first mortgage in favour of Vithalrao, and to have the amount payable on the said mortgage determined as between themselves and the present decree-holder.

In this view of the case, both parties are agreed that the questions between the decree-holder and the Karguppikars cannot be determined in these execution-proceedings, but must be left to be decided in a separate suit.

The result, therefore, is that the appeal is allowed and the darkhást dismissed as against defendants 7, 8 and 9 with costs throughout on the plaintiff.

Appeal allowed.

R. R.

(1) (1884) L R 11 I A. 126. (2) [1895] A. C. 11 at pp. 18, 19.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

1913. *July 23.*

DATTO ATMARAM HASABNIS (ORIGINAL APPLICANT), APPELLANT, *v.* SHANKAR DATTATRAYA (ORIGINAL PLAINTIFF), RESPONDENT.°

Civil Procedure Code (Act V of 1908), Order XXXIV—Limitation Act (IX of 1908), Schedule I, Article 181—Consent decree—Instalments—Application for decree absolute for sale—Limitation.

An application for a decree absolute for sale of a mortgage charge under the terms of a consent decree, which provided for satisfaction of the decretal debt by instalments, is an application under the Civil Procedure Code (Act V of 1908), Order XXXIV, and is governed by Article 181, Schedule I, of the Limitation Act (IX of 1908). Such application must be made within 3 years from the time the right to apply accrues.

SECOND appeal against the decision passed by V. M. Ferrers, District Judge of Satara, confirming an order passed by K. N. Bhide, Subordinate Judge of Islampur, in an execution proceeding.

The facts were as follows:—

An instalment decree passed in the terms of an award provided *inter alia* as under:—

If any one of the instalments remain unpaid at proper time, the plaintiff should wait for 2 months and then the plaintiff do recover the instalment which has already become due either by the sale of the properties on which the defendant held a right of mortgage, or from the defendant personally or both ways as he likes.

The decree was dated the 3rd November 1901. None of the instalments was paid on its due date or within 2 months afterwards and the last instalment which became due on the 12th May 1907 not having been paid at all, the decree-holder on the 13th September 1910 presented a darkhast, No. 201 of 1910, for the recovery of the balance of the decretal amount by sale of the land specified in the darkhast and he also prayed for making the decree absolute.

° Second Appeal No. 648 of 1911.

The judgment-debtor replied that the darkhast was time-barred.

The Subordinate Judge relying on the decision in *Tarvadi* v. *Bai Kashi*[1] found the decretal debt to be moveable property and dismissed the darkhast as time barred under Article 182, Schedule I of the Limitation Act (IX of 1908).

On appeal by the applicant decree-holder the District Judge confirmed the order.

The applicant decree-holder preferred a second appeal.

S. R. Bakhle, for the appellant (applicant decree-holder):—The decree obtained by us was on a sub-mortgage. It was, therefore, a mortgage decree under which we were entitled to recover the decretal amount by sale of the mortgagee's interest. The form of the decree being one as provided for by Order XXXIV, Rule 5, we could only bring the mortgage interest to sale by following the procedure laid down, that is, by getting the order for sale made absolute. The lower Courts erred in holding that the interest sought to be sold was interest in moveable property and, therefore, no order absolute was necessary The decision in *Tarvadi Bholanath* v. *Bai Kashi*[1] has no application. That case only lays down that the mortgaged property need not be attached under the provisions of the Civil Procedure Code relating to attachment. We are not seeking to sell the lands themselves but only the mortgagee's interest therein, and we can do so only when the order for sale is made absolute.

There is no period of limitation laid down for an application for making the order absolute. It has been held by this Court that there is no period provided for under the Limitation Act : *Ganu* v. *Narayan*[2], *Bhaga-*

(1) (1901) 26 Bom. 305

(2) (1903) 5 Bom. L. R. 540

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wan v. *Ganu*[1]. The present application is not really one for the execution of the decree but for making a decree in accordance with the order of the Court, and no period of limitation will begin to run until there is a decree capable of execution.

K. N. Koyaji, for the respondent (opponent judgment-debtor):—The rulings which laid down that no period of limitation applied to an application for making an order for sale absolute were passed before the new Civil Procedure Code of 1908 came into force. Under the new Code the provisions for making an order absolute are now transferred from the Transfer of Property Act to the Civil Procedure Code. Therefore the reason on which those rulings were based is no longer in existence. The Courts had held that the Limitation Act applied to applications under the Civil Procedure Code and not to other applications. Such applications now come under the Civil Procedure Code and therefore the Limitation Act will govern them: *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee*[2]. We, therefore, contend that an application for moving the Court to make the sale absolute must be made within three years from the day when the judgment-creditor became entitled to it.

Further, the property sought to be sold being the mortgagee's interest, it is merely a money claim, therefore, it was not necessary to attach it, nor was any proceeding for an order absolute necessary. The original mortgagor was not a party to the suit and in his absence the decree-holder cannot sell his interest. He cannot merely choose to sell the mortgagee's interest. In the forms given in Seton on Decrees, the form of a decree for such cases contains the name of the mortgagor, and he being a party the decree-holder is entitled

(1) (1899) 23 Bom. 644. (2) (1911) 3 Cal. 913.

to sell the mortgaged property. The decree in the present case is, therefore, not a proper decree and the judgment-creditor cannot execute it. By framing the suit in the manner he did, he missed his remedy.

Bakhle, in reply:—By framing the suit in the manner indicated we could have got the right to sell the mortgaged property itself. But that was not the only relief open to us. We are entitled to sell, if we choose, the lesser interest, namely, the mortgagee's interest. The original mortgagor being not a party, the decree will not affect his rights.

As to the applicability of the Limitation Act to such applications the rulings have so long been consistent and the change made by transferring the sections to Civil Procedure Code cannot affect the question. The making an order absolute is the act of the Court which, when an application is made, the Court cannot refuse. To such application, therefore, the provisions of the Limitation Act cannot apply: *Ishwardas Jagjivandas* v. *Dosibai*[1], *Chunni Lal* v. *Harnam Das*[2], *Madhabmani Dasi* v. *Lambert*[3].

Such applications seek to move the Court what the Court is bound to do in order that there should be a final decree in the litigation. The transfer of the sections to the Civil Procedure Code removes one of the reasons for the non-applicability of the Limitation Act, but the other reasons still remain.

SCOTT, C. J. :—The application in this case is for a decree absolute for sale of a mortgage charge, the property of the defendant, under the terms of a consent-decree. The consent-decree provided for satisfaction of the decretal debt by instalments. Three years from the due date of the last instalment becoming payable

[1] (1883) 7 Bom. 316 at p. 322. [2] (1898) 20 All. 302.
[3] (1910) 37 Cal. 796.

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expired in July 1910. The application which we are now considering was made subsequent to that date. The question is whether it was barred by limitation. The lower Courts have held that the debt due to the plaintiff was moveable property, and that, therefore, there was no need for an application for a decree absolute. They based the decision upon *Tarvadi Bholanath* v. *Bai Kashi*[1]. The question there turned upon whether the execution proceedings had been initiated under the right section of the Civil Procedure Code. That question does not arise in the present case. But although we cannot accept the reasons of the lower Courts, we think that the application must fail. The reason is that this is an application in form for a decree under Order XXXIV, of the Civil Procedure Code, and it is contended on behalf of the appellant that it must be treated as under Order XXXIV, and no other Order. That being so, it is an application under the Civil Procedure Code, and as such falls within the scope of Article 181 of the Limitation Act: see *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee*[2] The application under Article 181 must be made within three years from the time when the right to apply accrues. It has not been made within that period, and is, therefore, barred. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1901) 26 Bom. 305. (2) (1911) 38 Cal. 913.

APPELLATE CIVIL.

Before Mr Justice Batchelor and Mr Justice Shah

DAYA KHUSHAL AND OTHERS (ORIGINAL CLAIMANTS), APPELLANTS, *v.* THE ASSISTANT COLLECTOR, SURAT (ORIGINAL REFERRER), RESPONDENT.° 1913. *July 23.*

Land Acquisition Act (I of 1894)—Compulsory acquisition of land for quarrying purposes—Special adaptability for quarrying is element for consideration—Compensation

Where a piece of land is compulsorily acquired by Government for quarrying purposes its special adaptability for quarrying is an element for consideration in fixing the amount of compensation

APPEAL from the decision of M. S. Advani, District Judge of Surat.

The Government of Bombay acquired, on behalf of the Bombay Baroda and Central India Railway, under the Land Acquisition Act, 1894, 2 acres and 30 gunthas of land at Pardi in the Surat District, for quarrying purposes. On the land in question there were old quarries. Permission was not obtained from the Collector to work the quarries. The claimants demanded compensation for the land at the rate of Rs. 2,000 per acre. The District Judge, however, treated the land as a purely agricultural holding and awarded compensation at the rate of Rs. 32-8-11 per acre. The claimants appealed to the High Court.

G. K. Parekh, for the claimants.

S. S. Patkar, Government Pleader, for the respondent.

BATCHELOR, J. :—This is an appeal from an award by the learned District Judge of Surat under the Land Acquisition Act. Two acres and thirty gunthas of land belonging to the appellants have been acquired by Government for the B. B. & C. I. Railway, and it is important to note that the land has been acquired for the purpose of quarrying.

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The short point involved in the appeal is, whether the special adaptability of the land for quarrying is a matter to be excluded from consideration or not. The learned Judge below was of opinion that it should be excluded because the appellants had never obtained from the Government permission to quarry, and under section 65 of the Land Revenue Code the right of Government to mines and mineral products in land such as this is expressly reserved.

Now, to begin with, the appellants are entitled to claim that the compensation should be awarded to them on the footing that the "value of land should be determined, not necessarily according to its present disposition, but laid out in the most lucrative and advantageous way in which the owner can dispose of it": see *In the matter of the Land Acquisition Act X of 1870; Munji Khetsey*[1]. It is quite true that under section 65 of the Land Revenue Code the appellants are not entitled as of right to work the minerals in their land. That circumstance, however, is not decisive of the question as to the market value of the land. For, under Rule 39 of the Rules framed under section 214 of the Land Revenue Code it is provided that "The Collector may, at his discretion, sell by public auction or otherwise dispose of the right to remove...stone...or any other material which is the property of Government for such periods, in such quantities and on such terms as he thinks fit." By this rule the Collector is empowered, if he so chooses, by private treaty with the appellants to authorize them to quarry in this land. It is admitted before us that in actual practice it is common for the occupants of such lands to obtain the Collector's permission to quarry on the payment of certain fees, and this admission receives countenance from the circumstance that a special scale of fees has been sanctioned for the removal of stone and other materials from

(1) (1890) 15 Bom. 279 at p. 283.

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the soil. So far, therefore, the appellants appear to be in no worse case than would be the owners of agricultural land for which, on its acquisition, the claim is made that the market value should be estimated on the footing of its building site value, because in the case of agricultural land its conversion into a building site equally requires the permission of Government and is equally subject to the levy of certain fees. Yet in *Bhujabalappa* v. *Collector of Dharwar*[1] it was held that certain land, though technically agricultural land, was rightly valued on the basis of its being suitable for building purposes by reason of its proximity to a large town. The case, therefore, appears to us to fall within the principle which was laid down by the Court of Appeal in England in *Lucas and Chesterfield Gas and Water Board, In re*[2]. That was a case where the land was acquired for the purpose of making a reservoir. The land had a special adaptability for the construction of a reservoir, and it was laid down that the tribunal assessing the compensation ought to include in its consideration this special adaptability as an element of value, and that the consideration of this element was not to be excluded merely by reason of the fact that the land could not be actually used for the reservoir unless statutory powers for its compulsory purchase were first obtained. In delivering judgment Lord Justice Vaughan Williams quoted what was said by Mr. Justice Grove in *In Re Countess Ossalinsky and Manchester Corporation*[3] to the following effect :—" If the land has what I may call an adventitious value, that is, something beyond its mere agricultural or normal value—and that is a marketable value in this sense, that persons wishing, for a purpose for which the land is peculiarly applicable, to purchase that land would give a higher price for that land—then the arbitrator has a fair right to take

(1) (1899) 1 Bom L R 454 (2) [1909] 1 K. B 16.

(3) Referred to in [1909] 1 K. B. 16 at pp. 24, 26.

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that into consideration; it is a matter no doubt contingent, but still it is a matter which is not to be ignored or put out of consideration by an arbitrator." So, here, it seems to us that the special adaptability of this land for quarrying is a matter which ought to be considered. In the result it may or may not be that the market value of the land will be held to be enhanced owing to the special adaptability. But the question is one which, we think, ought to be included in, and not excluded from, consideration. What the Court has to determine is the market value of this land, and it may be that a willing purchaser would increase the price otherwise payable for the land by reason of its adaptability for use as a quarry, and that the price so offered would still be an increase on the ordinary agricultural price notwithstanding that the purchaser had to allow deductions on account, first, of the risk of not obtaining the Collector's permission under rule 39, and, secondly, of the fees which would be payable to the Collector in the event of permission being had. But the matter is one which, as we say, ought, in our opinion, to be considered, and since the learned Judge below has declined to consider it, we must now reverse his award and remand the case to him in order that he may decide it afresh in the light of the foregoing observations.

It will be open to either party to adduce fresh evidence with a view to throwing light on the question what is the market value of this land considered as a parcel of land with special adaptability for use as a quarry.

Costs will be costs in the reference.

We note for possible future guidance that the question as to the land's adaptability as a quarry, which we have discussed above, is the only question urged on behalf of the appellants.

Award reversed. Case remanded.

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The judgment-debtor replied that the darkhast was time-barred.

The Subordinate Judge relying on the decision in *Tarvadi* v. *Bai Kashi*[1] found the decretal debt to be moveable property and dismissed the darkhast as time barred under Article 182, Schedule I of the Limitation Act (IX of 1908).

On appeal by the applicant decree-holder the District Judge confirmed the order.

The applicant decree-holder preferred a second appeal.

S. R. Bakhle, for the appellant (applicant decree-holder) —The decree obtained by us was on a sub-mortgage. It was, therefore, a mortgage decree under which we were entitled to recover the decretal amount by sale of the mortgagee's interest. The form of the decree being one as provided for by Order XXXIV, Rule 5, we could only bring the mortgage interest to sale by following the procedure laid down, that is, by getting the order for sale made absolute. The lower Courts erred in holding that the interest sought to be sold was interest in moveable property and, therefore, no order absolute was necessary. The decision in *Tarvadi Bholanath* v. *Bai Kashi*[1] has no application. That case only lays down that the mortgaged property need not be attached under the provisions of the Civil Procedure Code relating to attachment. We are not seeking to sell the lands themselves but only the mortgagee's interest therein, and we can do so only when the order for sale is made absolute.

There is no period of limitation laid down for an application for making the order absolute. It has been held by this Court that there is no period provided for under the Limitation Act : *Ganu* v. *Narayan*[2], *Bhaga-*

(1) (1901) 26 Bom. 305. (2) (1903) 5 Bom. L. R. 540.

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wan v. *Ganu*(1). The present application is not really one for the execution of the decree but for making a decree in accordance with the order of the Court, and no period of limitation will begin to run until there is a decree capable of execution.

K. N. Koyaji, for the respondent (opponent judgment-debtor):—The rulings which laid down that no period of limitation applied to an application for making an order for sale absolute were passed before the new Civil Procedure Code of 1908 came into force. Under the new Code the provisions for making an order absolute are now transferred from the Transfer of Property Act to the Civil Procedure Code. Therefore the reason on which those rulings were based is no longer in existence. The Courts had held that the Limitation Act applied to applications under the Civil Procedure Code and not to other applications. Such applications now come under the Civil Procedure Code and therefore the Limitation Act will govern them *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee*(2). We, therefore, contend that an application for moving the Court to make the sale absolute must be made within three years from the day when the judgment-creditor became entitled to it.

Further, the property sought to be sold being the mortgagee's interest, it is merely a money claim, therefore, it was not necessary to attach it, nor was any proceeding for an order absolute necessary. The original mortgagor was not a party to the suit and in his absence the decree-holder cannot sell his interest. He cannot merely choose to sell the mortgagee's interest. In the forms given in Seton on Decrees, the form of a decree for such cases contains the name of the mortgagor, and he being a party the decree-holder is entitled

(1) (1899) 23 Bom. 644. (2) (1911) 3 Cal. 913.

to sell the mortgaged property. The decree in the present case is, therefore, not a proper decree and the judgment-creditor cannot execute it. By framing the suit in the manner he did, he missed his remedy.

Bakhle, in reply:—By framing the suit in the manner indicated we could have got the right to sell the mortgaged property itself. But that was not the only relief open to us. We are entitled to sell, if we choose, the lesser interest, namely, the mortgagee's interest. The original mortgagor being not a party, the decree will not affect his rights.

As to the applicability of the Limitation Act to such applications the rulings have so long been consistent and the change made by transferring the sections to Civil Procedure Code cannot affect the question. The making an order absolute is the act of the Court which, when an application is made, the Court cannot refuse. To such application, therefore, the provisions of the Limitation Act cannot apply: *Ishwardas Jagjivandas* v. *Dosibai*[1], *Chunni Lal* v. *Harnam Das*[2], *Madhabmani Dasi* v. *Lambert*[3].

Such applications seek to move the Court what the Court is bound to do in order that there should be a final decree in the litigation. The transfer of the sections to the Civil Procedure Code removes one of the reasons for the non-applicability of the Limitation Act, but the other reasons still remain.

SCOTT, C. J.:—The application in this case is for a decree absolute for sale of a mortgage charge, the property of the defendant, under the terms of a consent-decree. The consent-decree provided for satisfaction of the decretal debt by instalments. Three years from the due date of the last instalment becoming payable

(1) (1883) 7 Bom. 316 at p. 322. (2) (1898) 20 All. 302.
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expired in July 1910. The application which we are now considering was made subsequent to that date. The question is whether it was barred by limitation. The lower Courts have held that the debt due to the plaintiff was moveable property, and that, therefore, there was no need for an application for a decree absolute. They based the decision upon *Tarvadi Bholanath* v. *Bai Kashi*[1]. The question there turned upon whether the execution proceedings had been initiated under the right section of the Civil Procedure Code. That question does not arise in the present case. But although we cannot accept the reasons of the lower Courts, we think that the application must fail. The reason is that this is an application in form for a decree under Order XXXIV, of the Civil Procedure Code, and it is contended on behalf of the appellant that it must be treated as under Order XXXIV, and no other Order. That being so, it is an application under the Civil Procedure Code, and as such falls within the scope of Article 181 of the Limitation Act: see *Amlook Chand Parrack* v *Sarat Chunder Mukerjee*[2]. The application under Article 181 must be made within three years from the time when the right to apply accrues. It has not been made within that period, and is, therefore, barred. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

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[1] (1901) 26 Bom 305

[2] (1911) 38 Cal 913

APPELLATE CIVIL.

Before Mr Justice Batchelor and Mr. Justice Shah.

DAYA KHUSHAL AND OTHERS (ORIGINAL CLAIMANTS), APPELLANTS, v. THE ASSISTANT COLLECTOR, SURAT (ORIGINAL REFERRER), RESPONDENT.* 1913. July 23

Land Acquisition Act (I of 1894)—Compulsory acquisition of land for quarrying purposes—Special adaptability for quarrying is element for consideration—Compensation.

Where a piece of land is compulsorily acquired by Government for quarrying purposes its special adaptability for quarrying is an element for consideration in fixing the amount of compensation

APPEAL from the decision of M. S. Advani, District Judge of Surat.

The Government of Bombay acquired, on behalf of the Bombay Baroda and Central India Railway, under the Land Acquisition Act, 1894, 2 acres and 30 gunthas of land at Pardi in the Surat District, for quarrying purposes On the land in question there were old quarries. Permission was not obtained from the Collector to work the quarries. The claimants demanded compensation for the land at the rate of Rs. 2,000 per acre. The District Judge, however, treated the land as a purely agricultural holding and awarded compensation at the rate of Rs. 32-8-11 per acre. The claimants appealed to the High Court.

G. K. Parekh, for the claimants.

S. S. Patkar, Government Pleader, for the respondent.

BATCHELOR, J. :—This is an appeal from an award by the learned District Judge of Surat under the Land Acquisition Act. Two acres and thirty gunthas of land belonging to the appellants have been acquired by Government for the B. B. & C. I. Railway, and it is important to note that the land has been acquired for the purpose of quarrying.

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The short point involved in the appeal is, whether the special adaptability of the land for quarrying is a matter to be excluded from consideration or not. The learned Judge below was of opinion that it should be excluded because the appellants had never obtained from the Government permission to quarry, and under section 65 of the Land Revenue Code the right of Government to mines and mineral products in land such as this is expressly reserved.

Now, to begin with, the appellants are entitled to claim that the compensation should be awarded to them on the footing that the "value of land should be determined, not necessarily according to its present disposition, but laid out in the most lucrative and advantageous way in which the owner can dispose of it": see *In the matter of the Land Acquisition Act X of 1870; Munji Khetsey*[1]. It is quite true that under section 65 of the Land Revenue Code the appellants are not entitled as of right to work the minerals in their land. That circumstance, however, is not decisive of the question as to the market value of the land. For, under Rule 39 of the Rules framed under section 214 of the Land Revenue Code it is provided that "The Collector may, at his discretion, sell by public auction or otherwise dispose of the right to remove...stone...or any other material which is the property of Government for such periods, in such quantities and on such terms as he thinks fit." By this rule the Collector is empowered, if he so chooses, by private treaty with the appellants to authorize them to quarry in this land. It is admitted before us that in actual practice it is common for the occupants of such lands to obtain the Collector's permission to quarry on the payment of certain fees, and this admission receives countenance from the circumstance that a special scale of fees has been sanctioned for the removal of stone and other materials from

[1] (1890) 15 Bom. 279 at p. 283.

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(1) (1899) 1 Bom. L. R. 454.
(2) [1909] 1 K. B. 16.
(3) Referred to in [1909] 1 K. B. 16 at pp. 24, 26.

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It will be open to either party to adduce fresh evidence with a view to throwing light on the question what is the market value of this land considered as a parcel of land with special adaptability for use as a quarry.

Costs will be costs in the reference.

We note for possible future guidance that the question as to the land's adaptability as a quarry, which we have discussed above, is the only question urged on behalf of the appellants.

Award reversed. Case remanded.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

ACHUT RAMCHANDRA PAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* NAGAPPA BAB BALGYA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.[°]

1913. *July* 24.

Civil Procedure Code (Act V of 1908), sections 107, 149; Order VII, Rule 11, clause (c)—Memorandum of appeal insufficiently stamped—Presenting the memorandum of appeal on the last day for filing—Court must give time for paying up deficiency.

A memorandum of appeal which required a Court fee stamp of Rs. 205 was stamped with an eight annas stamp and was filed in Court on the last day allowed by the law of limitation. The pleader on being questioned stated that he had no funds with which to pay the requisite stamp and requested the Court to give him time for making the necessary payment. The Court refused to grant the time applied for and rejected the memorandum of appeal. The plaintiff having appealed :—

Held, reversing the order, that the lower Court was in error in rejecting the memorandum of appeal, and that it ought to have granted time within which to supply the requisite stamp.

APPEAL from the order passed by C. V. Vernon, District Judge of Kanara, from the decision of J. A. Saldanha, Subordinate Judge at Kumta.

The plaintiff sued to recover Rs. 3,511 odd by sale of the mortgaged property. The suit was dismissed by the Subordinate Judge.

The plaintiff appealed to the District Court of Kanara. The memorandum of appeal required a Court fee stamp of Rs. 205: but it bore only a stamp of eight annas, because the pleader had not sufficient funds to pay the full amount. The memorandum was presented on the last day allowed by the law of limitation. The pleader requested the Court to give him time for pay-

[°] Second Appeal No. 520 of 1912.

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ing the deficiency. The Court, however, declined to give time and rejected the appeal on the following grounds :—

The Court holds that the provisions of section 149 were certainly not intended to be used, as appellant is trying to use them, for the purpose of extending the period of limitation, but solely for the purpose of enabling the Court to deal equitably with any *bonâ fide* misconstruction of the law as to valuation No such *bonâ fide* misconstruction is alleged in the present case. Order VII, Rule 11, applies only to plaints, not to appeals Mr. Kamat refers to the case of *Dhondiram* v *Taba Saradan* (I L. R. 27 Bom. 330). That case related solely to the institution of a suit by plaint. The case of appeal is expressly distinguished in *Hari Ram* v. *Akbar Husain* (I. L. R 29 All. 749, 764 and 770) Section 582A of the Code of 1882 was clearly intended to limit the period of grace to be allowed by Court to cases in which the insufficiency of the stamp was caused by the mistake of the appellant. Section 582A does not appear in the new Code (Act V of 1908). Its place is taken by section 149, which gives the Court very wide discretionary powers.

The plaintiff appealed to the High Court.

G. P. Murdeshwar (with *K. H. Kelkar*), for the appellants :—The provisions of Order VII, Rule 11, of the Civil Procedure Code, 1908, which primarily refer to plaints, apply also to memoranda of appeals by section 107, clause (2) of the Code. The provisions of Order XLI, Rule 3, apply only to cases there specified. Section 149 of the Code applies to all documents and is not confined to plaints or memoranda of appeals.

V. R. Sirur, for the respondent :—Order VII, Rule 11, governs plaints, while memoranda of appeals are governed by Order XLI, Rule 3. An insufficiently stamped memorandum of appeal is not properly presented under Rule 1 of Order XLI and can be rejected under Rule 3 of the Order. See sections 6, 28 and 30 of the Court Fees Act, 1870. If Order VII, Rule 11, (corresponding to section 54 of the Civil Procedure Code of 1882) applied to appeals, then section 582A of the Code of 1882 would become superfluous. Section 582A is replaced in the new Code by section 149. The wording of the section is very wide. It should be read in

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conformity with section 28 of the Court Fees Act, 1870. See also *Balkaran Rai* v. *Gobind Nath Tiwari*[1]; *Chennappa* v. *Raghunatha*[2]; *Patcha Saheb* v. *Sub-Collector of North Arcot*[3]; *Yakutunnissa Bibee* v. *Kishoree Mohun Roy*[4]; *Moti Sahu* v. *Chhatri Das*[5]; *Hari Mohun Chuckerbutti* v. *Naimuddin Mahomed*[6].

BATCHELOR, J. :—The appellants before us were the plaintiffs in the original suit, and the trial Court made a decree against them. On the last day allowed by the law of limitation they filed their appeal in the District Court. The memorandum of appeal was, however, insufficiently stamped, and the plaintiffs' pleader on being questioned as to this replied that he had no funds with which to pay the requisite stamp, and requested that the Court would give him time within which to make the necessary payment. The District Judge refused to grant the time applied for, and rejected the memorandum of appeal.

The question before us is whether that was a right order. There can be no doubt, we think, that if the document presented had been a plaint and not a memorandum of appeal, the learned Judge's order of rejection would have been unsustainable. That appears to follow from the terms of Order VII, Rule 11 (c) which provides for the case of the presentation of a plaint written upon paper insufficienly stamped, and the provision of the law is that such a plaint shall be rejected only if the plaintiff on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court fails to do so. In the case of an insufficiently stamped plaint, therefore, it is clear that provided the insufficiently stamped paper be presented within the time allowed by the law of

(1) (1890) 12 All 129.
(2) (1891) 15 Mad 29.
(3) (1891) 15 Mad 78.
(4) (1891) 19 Cal. 747.
(5) (1892) 19 Cal. 780.
(6) (1892) 20 Cal. 41.

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limitation, the appellant is entitled as of right to demand from the Court that some further time, to be fixed according to the Court's discretion, shall be allowed to him in order that he may make up the deficiency in the stamp. In our opinion a memorandum of appeal stands on the same footing as a plaint for the present purposes. For section 107, sub-section 2 of the Code, which reproduces section 582 of the old Code, provides that the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein. Moreover, unless the authority to reject such a memorandum of appeal as this is referred to Order VII, Rule 11 (c), there is not, so far as we are aware, any authority to which such action of the Court could be referred.

Mr. Sirur for the respondents has urged that the rejection of a memorandum of appeal should be attributed not to Order VII, Rule 11 (c), but to Order XLI, Rule 3. It is true that this rule provides for the rejection of a memorandum of appeal in certain cases; but those cases are limited by the preceding rules to cases where the memorandum of appeal is defective in point of form or in respect of the grounds which it must contain, and this rule cannot, we think, be interpreted as covering a case where the memorandum of appeal is rejected by reason of insufficiency of stamp.

There is not, in our opinion, anything repugnant in this interpretation of the law. Admittedly, before the present Code was enacted, there was much divergence of opinion between the High Courts of India upon this and cognate points, and it may well be that in this difference of judicial opinion the Legislature thought well to adopt the principle that where the plaintiff or appellant was within time in the actual

presentation of his plaint or memorandum of appeal, though matters could not then be carried further owing to the document being insufficiently stamped, yet the party should be entitled to some further time for the payment of Court fees. It seems hardly necessary to observe that the obligation imposed by the law of limitation and the obligation to pay the requisite fees are matters which stand on a very different basis

Then it was urged that this view of the law is in conflict with section 149 of the Civil Procedure Code. That section, however, is, as we read it, a general provision empowering the Court to extend the time for the payment of fees on any and all documents which may be presented to it. But when a particular document is a plaint or memorandum of appeal, then the Court's discretion must be exercised in accordance with the special provisions of Order VII, Rule 11 (c). Thereafter section 149 would come into play, and would operate to produce this effect, that upon the payment of the requisite fee within the time allowed by the Court, the document in respect of which such fee was payable would have the same force and effect as if such fee had been paid in the first instance. The learned Judge below in considering section 149 observed that it was intended "solely for the purpose of enabling the Court to deal equitably with any *bonâ fide* misconstruction of the law as to valuation". We are of opinion, however, that this is not the correct interpretation of section 149. First, there are no words in the section to countenance or warrant such a limited construction of it. Then the section as it stands is a section which in the new Code was substituted for section 582A of the old Code. Section 582A was apparently enacted with a view to remove what was considered to be the hardship caused by certain decisions of the Allahabad High Court, and

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that section provided for the validation of insufficiently stamped memoranda of appeals provided that they had been presented within the proper period of limitation and "the insufficiency of the stamp was caused by a mistake on the part of the appellant as to the amount of the requisite stamp". Under section 582A, therefore, the discretion of the Court was fettered by this limitation that the insufficiently stamped memorandum of appeal could not be validated unless the Judge was satisfied that the insufficiency arose from a mistake on the part of the appellant.

Turning now to section 149 of the present Code, it will be seen that these words of limitation are omitted from it, and the inference appears to be that the legislature by the new provision intended that the Court should have a free and unshackled discretion in this matter. There seems, therefore, to be no ground for the learned Judge's view that the concession referred in section 149 must be restricted to cases where there was a *bonâ fide* misunderstanding of the law as to valuation

Finally, Mr. Sirur endeavoured to call in aid of his clients sections 6, 28 and 30 of the Court Fees Act, but these sections, in our opinion, have no application to the facts at present before us. For there is no question in this appeal of receiving, or filing, or exhibiting or acting upon an insufficiently stamped document as if it were sufficiently stamped, but of determining what, if any, opportunity the appellant can claim under the law for removing the objection on the score of the insufficiency of the stamp.

On these grounds we are of opinion that the order made by the learned Judge below must be set aside. We accordingly reverse it and remand the appeal to him to be decided in accordance with the foregoing observations and with the provisions of section 149

and of Order VII, Rule 11 (c), after the learned Judge shall have required the appellants to supply the requisite stamp paper within a time to be fixed by the District Court. 1913.

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The appellants must have the costs of this appeal.

Order set aside.

R. R.

APPELLATE CIVIL.

Before Mr Justice Heaton and Mr Justice Shah

BACHARAJ NYAHALCHAND MARWADI (ORIGINAL DEFENDANT), APPELLANT, v BABAJI TUKARAM AVATI (ORIGINAL PLAINTIFF), RESPONDENT.* 1913 *August 5*

Limitation Act (IX of 1908), section 19, Schedule I, Article 182, clause 5 —Written acknowledgment—Application made for certifying payments on the decree acknowledging the decree as an outstanding decree—Step-in aid of execution.

The plaintiff obtained a decree on the 3rd July 1900 whereby he was required to pay a sum of Rs 600 by annual instalments of Rs. 50 and to redeem the mortgaged land The decree also provided that on failure to pay any two instalments the plaintiff's right to redeem was to be foreclosed and the defendant was to be placed in possession of the land. The instalments for 1901 and 1902 were duly paid, while the one for 1903 was only paid in part. No other payments were made On the 20th July 1905, the plaintiff made an application to the Court, which was consented to by the defendant, for certifying the above payments in satisfaction of the decree This application referred to the decree as an outstanding decree. On the 14th December 1907, the defendant applied to foreclose the decree; but the application was dismissed for want of prosecution. He applied again on the 29th March 1909 for the purpose; but his application was dismissed as barred by limitation. The defendant having appealed —

Held, that the application was within time, for the application of 1905 was sufficient to give a fresh starting point for limitation, either as an acknowledgment within the meaning of section 19 of the Limitation Act (IX of 1908), or as a step-in-aid of execution under Article 182, clause 5 of the First Schedule to the Act

* Second Appeal No. 895 of 1912.

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SECOND appeal from the decision of G. D. Madgaonkar, District Judge of Ahmednagar, confirming an order passed by J. N. Atre, Subordinate Judge at Parner.

Proceedings in execution.

The plaintiff obtained a decree on the 3rd July 1900, in terms of an award, whereby it was provided as follows :—

"The plaintiff Babaji valad Tukaram Avati should pay Rs. 600 to the defendant Bachharaj Nyahalchand Marwadi by twelve instalments in the following manner —*viz.*, he should pay Rs 50 on the 30th of June 1901 and from that date onward he should pay an instalment of Rs 50 every year on the said date or before it and thus pay off the (whole) amount due to the defendant. If the plaintiff fails to pay any two instalments to the defendant in time, his right to redeem the mortgaged lands shall for ever be foreclosed and then the said land should be taken by the defendant into his possession from that of the plaintiff. Till then the lands should be allowed to remain in the possession of the plaintiff himself"

The first two instalments were paid in time. For the third one only Rs. 35 were paid on the 10th May 1903. No other payments were made.

The plaintiff applied on the 20th July 1905 to the Court for having the above payments certified in adjustment of the decree. The application was assented to in writing by the defendant ; and ran as follows :—

"Agreeably to the order passed in the decree of the above mentioned No, the plaintiff has paid to the defendant Rs 100 in all by the first and second instalments, and Rs 35 out of the amount of the third instalment, that is, he has paid to the defendant Rs 135 on account of the decree The application is made for making this (fact) known It is therefore requested that an endorsement to that effect may be made on the register of suits."

On the 14th December 1907, the defendant applied to the Court for an order for foreclosure as provided in the decree. This application was dismissed as process fee was not paid. He applied again on the 29th March 1909, for an order for foreclosure.

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The lower Courts dismissed the application on the ground that it was barred by limitation.

The defendant appealed to the High Court.

P. D. Bhide, for the appellant :—We submit that the application for execution is in time. First, because the application being for a decree absolute is not governed by any article in the First Schedule for the Limitation Act. See *Bakatram Nanuram* v. *Kharsetji*[1]; *Madhabmani Dasi* v. *Lambert*[2]; *Bai Manekbai* v. *Manekji Kavasji*[3]; *Ashfaq Husain* v. *Gauri Sahai*[4]; *Ajudhia Pershad* v. *Baldeo Singh*[5]; *Tiluck Singh* v. *Parsotein Proshad*[6] and *Puran Chand* v. *Roy Radha Kishen*[7]. Secondly, the application (Exhibit 19) dated the 20th July 1905 is an acknowledgment within the meaning of section 19 of the Indian Limitation Act. See *Ahmad Ali Khan* v. *Husain Ali Khan*[8] and *Janki Prasad* v. *Ghulam Ali*[9]. Thirdly, the application (Exhibit 19) is a step-in-aid of execution. See *Wasi Imam* v. *Poonit Singh*[10]; *Ghansham* v. *Mukha*[11]; *Beni Madho* v. *Basdeo Patak*[12]; and *Koormayya* v. *Krishnamma Naidu*[13].

P. B. Shingne, for the respondent :—Exhibit 19 is not an acknowledgment. It contains no mention of the defendant's right to get a decree absolute. Nor is the application a step-in-aid of execution. See *Shib Lal* v. *Radha Kishen*[14] and *Wasi Imam* v. *Poonit Singh*[10].

SHAH, J. :—The facts which give rise to this appeal are as follows :—

On the 3rd July 1900, the plaintiff obtained a decree in the terms of an award, whereby he was required to

(1) (1903) 27 Bom. 560.
(2) (1910) 37 Cal. 796.
(3) (1880) 7 Bom. 213.
(4) (1911) 33 All. 264.
(5) (1894) 21 Cal. 818.
(6) (1895) 22 Cal. 924.
(7) (1891) 19 Cal. 132.
(8) (1887) 10 All. 109.
(9) (1882) 5 All. 201.
(10) (1893) 20 Cal. 696.
(11) (1880) 3 All. 320.
(12) (1890) 12 All. 99.
(13) (1893) 17 Mad. 165.
(14) (1885) 7 All. 898.

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pay a sum of Rs. 600 by annual instalments of Rs. 50 and to redeem the mortgaged property. It was further provided in the decree that "if the plaintiff failed to pay any two instalments to the defendant in time, his right to redeem the mortgaged lands should for ever be foreclosed and then the said lands should be taken by the defendant into his possession from that of the plaintiff. Till then the lands should be allowed to remain in the possession of the plaintiff himself." Subsequent to this decree, two instalments in full for 1902 and one instalment in part for the year 1903 were paid by the plaintiff to the defendant. No other instalment was paid thereafter. An application was made on the 20th July 1905 to the Court for certifying those payments in satisfaction of the decree. This application was signed by the plaintiff and was consented to by the defendant. On the 14th December 1907, an application was made by the defendant for an order of foreclosure in terms of the decree; but that application was dismissed, because no steps to prosecute the same were taken. The present application was made on the 29th of March 1909. The defendant by this application seeks to have an order of foreclosure in the terms of the decree.

The plaintiff raised objections to this application and urged that the application was barred by limitation. Both the lower Courts have found in favour of the plaintiff and held that the application is barred by time.

The defendant has preferred the present Second Appeal and has urged in support thereof that the lower Courts have wrongly decided the question of limitation. It is contended that the present application for an order for foreclosure is really an application under section 93 of the Transfer of Property Act, and that there is no period of limitation applicable to such an application. It is further urged that even assuming

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that there is a period of limitation to which this application is subject, still having regard to the application of the 20th of July 1905 and to the previous *darkhast* of December 1907, the present application is in time.

With regard to the first point, we express no opinion in this appeal. Having regard to the view which we take of the second contention urged on behalf of the appellant, it is unnecessary to come to a definite conclusion on the first point.

Assuming that the application under section 93 of the Transfer of Property Act, or rather the application seeking foreclosure, is subject to the same rules of limitation which govern an ordinary application for execution we are clearly of opinion that in the present case, the two previous applications, which we have already referred to, are sufficient to save the present application. The determination of this question depends upon the construction which is to be placed upon the application of the 20th July 1905. Both the lower Courts have found that this application is not an acknowledgment. It is urged here that having regard to the terms of the application, it amounts to an acknowledgment within the meaning of section 19 of the Limitation Act. Having regard to the terms in which the decree is referred to in this application by the plaintiff, we think that it clearly contains an acknowledgment within the meaning of section 19. The decree, as we read the application, is referred to therein as an outstanding decree, and the payments mentioned in the application are mentioned as payments made on account of the decree.

It was also urged on behalf of the appellant that this was an application for a step-in-aid of execution and as such was sufficient to save limitation. Having regard to the form and purpose of the application and having regard to the fact that it is consented to by the defend-

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ant, we think that it must be treated in effect as a joint application by the plaintiff and the defendant for the purpose of having the payments duly certified. We take the same view of this application and of the effect thereof as was taken of a somewhat similar application in the case of *Wasi Imam* v. *Poonit Singh* (1). In either view of this application, it is clear that it is sufficient to give a fresh starting point for limitation. The subsequent application of December 1907 was made within three years from this date, and the present application is made within three years from the date of the preceding application. The trial Court has referred to certain circumstances as showing that the application of July 1905 (Exhibit 19) loses much of its 'evidential value'. The appellate Court has not gone into this question. But after considering these circumstances, we see no reason to think that the application was not duly made by the plaintiff and that he is not responsible for the contents thereof. In fact the learned Pleader for the respondent fairly conceded that he could not support the view taken by the trial Court on this point.

We, therefore, come to the conclusion that the present application is not time-barred.

The result, therefore, is that this appeal is allowed, the order of the lower Court set aside and the case sent back to be dealt with according to law. The appellant to have his costs throughout.

Appeal allowed.

R. R.

(1) (1893) 20 Cal. 696

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr Justice Shah

KRISHNADIXIT BIN BALDIXIT TORO (ORIGINAL DEFENDANT NO 2), APPELLANT, v BALDIXIT VAMANDIXIT AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANT NO 1), RESPONDENTS.[*]

1913
August 6.

Adverse possession—Lease of land by an agent of landlord—Collection of rent by the agent—Agent paying over the rent to the landlord—Agent setting up his own title and keeping the rent to himself during continuance of lease—Landlord's right to land at determination of tenancy

In 1887 certain land belonging to defendant No 2's family was leased to a tenant for 18 years by a registered lease by the plaintiffs' family, who acted as agents of the defendant No 2's family, and collected the rent and paid it over to them. The rent was so paid till 1893, when the plaintiff's family set up their own title to the land and ceased paying over the rent to the defendant No 2 The tenant remained in possession of the land till the determination of the tenancy in 1905, and then attorned to defendant No 2. In 1908, the plaintiffs sued to recover possession of the land, alleging that the title of defendant No 2 to the land was lost by the adverse possession of the plaintiff The lower Courts decreed their claim. On appeal by defendant No. 2.—

Held, reversing the decree, that so long as the tenant held the land under the tenancy he held it as the tenant of defendant No. 2's family and their rights were just as good at the end of the tenancy as they were at the beginning, and were absolutely unaffected in any particular by the reiterated assertions made by the plaintiffs of an adverse title or by the fact that the rents were retained by the plaintiff

SECOND appeal from the decision of F. K. Boyd, District Judge of Bijapur, confirming the decree passed by V. R Kulkarni, Subordinate Judge at Muddebihal.

Suit to recover possession of land.

One Yadneshwar, the predecessor of defendant No. 2, owned the land. In 1887, the plaintiffs, acting as agents of the defendant No. 2's family, leased the land to one Ishvardixit for a term of 18 years by a registered lease. At first, the plaintiff used to collect the rent and to pay it over to defendant No. 2's family. In 1893, however,

[*] Second Appeal No 292 of 1912.

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Ishwara was his tenant. I cannot think of any principle of law on which this position can properly be based and I think none was indicated. The land belonged to the family of defendant No. 2, and they were the landlords just as they were the owners, and Ishwara was their tenant although his actual dealings were with their agent. So long as the tenant held possession under the tenancy, he was the tenant of defendant No. 2's family. He was their tenant up to the last moment he held the land under the lease, and when he relinquished the land defendant No. 2 was at liberty to enter into possession; or if any difficulty or opposition was offered he could bring a suit to remove that opposition or difficulty and his right to bring the suit would date from the moment when the tenancy terminated. That was far within 12 years from the date on which this suit was brought.

The District Judge has considered that the possession was adverse, because there was notice of adverse holding accompanied by an overt act. No doubt there was a notice that the plaintiffs' family claimed the ownership and there was an overt act in that the rent was withheld. But the difficulty in the way of this argument is this: the possession, or occupation rather, was with the tenant, and the tenant was the tenant of defendant No. 2's family, so that the possession actually was on behalf of the defendant No. 2's family and the possession legally was with them. A very large number of authorities have been referred to, but out of them all I will only mention two. The first is the *Secretary of State for India* v. *Krishnamoni Gupta*[1], where the nature of adverse possession is discussed in relation to facts in some respects similar to those in this case. The law pertinent to the point before us is summarised in a passage at page

(1) (1902) 29 Cal. 518.

535: "In order to sustain a claim to land by limitation under the Indian Act, there must in their Lordships' opinion be actual possession of a person claiming as of right by himself or by persons deriving title from him." To apply that principle here we find that the plaintiffs' family had not actual possession by themselves or by persons who derived title from them The person in actual occupation derived title from the defendant's family. Therefore the plaintiffs could not acquire the title by adverse possession The other case is *Bissesuri Dabeea* v. *Baroda Kanta Roy Chowdry*[1], and this is a case which is very strongly relied on by the counsel for the respondent. It was a case in which the Zamindar, whose land was held by tenants, had his title jeopardized by the defendants in that case who had turned out the tenants and were claiming the land as against them. The Court held that though the tenancy still continued, there was a cause of action not only to the tenants but to the landlords, because their title was jeopardized. But how was it jeopardized? It was jeopardized because the defendants had turned out the tenants and taken possession of the land. We are invited to apply that principle to a case where there was no turning out of the tenant whatever, where the tenant remained in possession as the tenant, and the only way in which the landlord's rights were affected was by a statement of adverse title and a refusal by an agent to account for rents received. It is perfectly true that the defendant No. 2 or his family could have brought certain suits. They could no doubt have established their right to receive the rents. They could have obtained an order that the tenant was not to pay rent to any member of the plaintiffs' family and so forth. But they could not have brought a suit for possession, because there was no cause of action which entitled or enabled them

[1] (1884) 10 Cal 1076.

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to do that. They could not in short have brought any suit which would have fallen within the words of section 28 of the Limitation Act. That is merely another way of reaching the conclusion at which I have already arrived.

The proper order in the case is to reverse the decree of the appellate Court which is based on a decision of a preliminary point, *viz.*, limitation, and to remand the case to be disposed of in the light of our finding on the issue of limitation.

Costs throughout to be costs in the cause.

SHAH, J.:—I concur in the conclusion arrived at and the order proposed by my learned brother. On the assumed state of facts, upon which the lower appellate Court has decided the question of limitation, it is clear that there could be no adverse possession of the plaintiff against defendant No. 2. The tenant was in possession from 1887 and had a right to remain in possession upto 1905. During this interval defendant No. 2 had no right to recover possession. It is also clear on the assumed facts, that the property was not in the actual possession of the plaintiff claiming as of right by himself or by persons deriving title from him. He could not, therefore, sustain a claim to land by limitation.

Further in the present case the repudiation of title, based on the allegation that Anna was the heir of Yadneshwar in 1893, is not of such an unequivocal character as to amount to a notice to defendant No. 2 that he was going to claim the property adversely to him even if it were found that he was not Yadneshwar's heir. We have the fact that after that assertion of title, the Revenue Authorities decided in favour of the widow Jivubai and did not accept Anna's claim. Subsequently in 1895 when Jivubai died, there was an occasion for Anna to assert his title; but no such assertion was made. It is not suggested that he ever put himself

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forward as the heir of Yadneshwar on any subsequent occasion. I do not think it right to assume that Anna wanted to maintain the improper position which he took up in 1893, *viz.*, that he was the heir of Yadneshwar and therefore the owner of the property in suit.

Secondly, the overt act, which has been relied upon by the lower appellate Court, amounts only to this that Anna received the rents from the tenant and withheld them from defendant No. 2. It is not established in this case that prior to 1894 the rents were regularly paid by Anna to defendant No. 2 from year to year. Accounts were made apparently at irregular intervals and it is difficult to say that the mere withholding of the rents by Anna, at least for some reasonable time after the first assertion of his title in 1893, was such an overt act as would suffice to make his enjoyment adverse. The present suit was brought on the 17th September 1908, and the overt act which the plaintiff must prove must be prior to twelve years before the date of the suit. It is quite possible that honestly acting the plaintiff may have made up as before his accounts in 1896 or in 1897, and withholding the payment of rents for two or three years would not in the circumstances be necessarily an overt act of such a character as would justify the finding on the question of limitation. The subsequent withholding of rents in the present case is not a matter of much moment, because the repudiation of title and the overt act must necessarily be more than twelve years prior to suit.

On these grounds I think that the finding on the question of limitation cannot be accepted.

Decree reversed.

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The proper order in the case is to reverse the decree of the appellate Court which is based on a decision of a preliminary point, *viz.*, limitation, and to remand the case to be disposed of in the light of our finding on the issue of limitation

Costs throughout to be costs in the cause.

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Raikes, with him *Strangman*, *Inverar...* for the appellant.

Setalwad, with *Kanga*, for the respondent.

SCOTT, C. J.:—This is an appeal from a judgment of Davar, J. whereby he set aside an award upon motion of the respondent on the ground of misconduct on the part of the umpire named in an order of reference.

The reference was made in a suit filed by the appellant against the respondent to recover the amounts alleged to be due on a mortgage and two deeds of further charge.

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In the plaint an adjustment of account, dated the 31st of August 1910, was alleged from which it appeared that the sum of Rs. 5,71,770-2-0 was found to be due to the plaintiff which sum had been slightly reduced by payments made by the defendant prior to the date of suit, namely, on the 11th of October 1910.

The defendant by his written statement pleaded that his signature to the said adjustment was obtained by fraud and that accounts should be taken.

On the 16th of March 1911 a consent order was obtained whereby the suit and all matters in dispute therein were referred to the determination of two arbitrators and in the event of their failing to make their award to Mr. K. F. Modi as umpire.

The defendant's case is that his solicitor made it an indispensable condition of the reference that all alleged adjustments of account should be set aside; and that the plaintiff's attorneys agreed to this and it was accordingly provided by the consent order as follows:—

"And it is further ordered that the said arbitrators do proceed on the basis of there having been no adjustments, and the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration."

It appears from the plaintiff's affidavit of documents, dated the 2nd of December 1910, that he relied upon two statements of account adjusted and signed by the defendant one of which was the basis of and contemporaneous with the earlier of the two deeds of further charge and the other was the adjustment referred to in the plaint and written statement.

The defendant thus describes the proceedings before the arbitrators and the initial proceedings before the umpire in paragraphs 12, 13 and 14 of his affidavit in the motion.

12. The arbitrators appointed by the said order of reference took up the reference on the 6th day of April 1911, directed the plaintiff to allow

me this deponent inspection of all the entries in his own personal books of account relating to the dealings and transactions between us and also directed him to give me inspection of the books of account relating to the plying of the said steamers on my account all which inspection the plaintiff had theretofore refused to give me because of the said adjustment of 31st August 1910 and others before it Thus as directed by the said consent order of reference the alleged adjustments were set aside The arbitrators further directed the plaintiff to bring in his accounts. Accordingly the plaintiff brought in two accounts, one of which contained all the several sums with interest thereon which were alleged by him, to have been lent and advanced to me on the mortgage of my properties and were included in the said adjustment of the 31st day of August 1910 and included in addition a sum of Rs. 17,529 for further interest from the date of the said adjustment to 30th December 1910 and an altogether new sum of Rs. 68,251 alleged to be due by me to the plaintiff in respect of the plying of the said steamers This last mentioned sum was not included in the alleged adjustment of 31st August 1910, nor in the second deed of further charge which was executed on 17th June 1909 in respect of the alleged losses in the plying of the said steamers. It was also not claimed by the plaint and is entered on 21st December 1910 in a fraudulent account got up by the plaintiff after the filing of this suit This account has in the proceedings before the arbitrators and the umpire been referred to as the 'mortgage account' The plaintiff was also directed to bring in an account of the plying of the said steamers by him on my account To both these accounts I, this deponent, was directed to bring in my objections and surcharges. In this manner the accounts between me and the plaintiff were opened up as if there had been no adjustments of account between me and the plaintiff and the same were not taken into consideration

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13 The arbitrators having omitted to extend the time for making their award at the proper time and there being no possibility of their agreeing owing to a strong bias betrayed in favour of the plaintiff by the arbitrator appointed by him, they had to give up proceeding further and the reference was taken up by the umpire on the 8th day of September 1911 under the provision in that behalf contained in the order of reference

14. The umpire accepted the accounts brought in by the plaintiff and the objections and surcharges brought in by me this deponent and the proceedings before him thus commenced on the footing of there being no adjustments. My objections to the mortgage account brought in by the plaintiff were first taken in hand and they were proceeded with in accordance with the usual practice, the burden of proving the items objected to being considered to be on the plaintiff

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It is thus conceded by the defendant that the proceedings were commenced before the umpire on the footing of there being no adjustments.

If the accounts had been taken as settled subject to surcharge and falsification the burden of proof in regard to the items objected to would have lain upon the objector: see *Gething* v. *Keighley*[1]. The first item dealt with was an objection that a sum of Rs. 7,053-8 was not due but only Rs. 7,000, because the Rs. 53-8 was attributable to interest if calculated at 9 per cent. In proof of the item objected to the plaintiff's solicitor put in without objection the earlier of the adjusted accounts, which had also been put in before the arbitrators, as an admission that the sum claimed had been transferred to the defendant on the 13th of March 1908. The same item also appears in the adjusted account of the 31st of August 1910. The defendant then led evidence to show that the interest should have been calculated at 6 per cent. only. In the course of that evidence the adjusted account of the 31st of August was referred to by the defendant's solicitor and was marked for identification at his instance and the same account was afterwards used in cross-examination of the defendant by the plaintiff's solicitor without any objection.

At a later stage of the proceedings when all the items of objection but two relating to a sum of Rs. 1,300 and to certain bills of costs had been dealt with or transferred to other accounts for investigation the plaintiff's solicitor put in the second adjusted account of the 31st August 1910 as proof of an admission that a sum of Rs. 1,300 was due by defendant upon a transfer to the plaintiff of a debt due to the defendant by one Mulla Fazalalli, and contended that the onus of proving that the plaintiff had not relinquished his claim against Mulla Fazalalli for this amount with the consent and at the request of

(1) (1878) 9 Ch. D. 547 at p. 552.

the defendant was by the admission shifted on to the defendant.

Although this was merely a repetition of the procedure adopted with reference to the sum of Rs. 7,053-8, some months earlier, it gave rise to lively protests on the part of the defendant's solicitor and the umpire was asked to submit a special case for the opinion of the Court, under clause 11 of Schedule II of the Civil Procedure Code. The umpire said he was doubtful whether that would apply but postponed further consideration of the item of Rs. 1,300 in order to give the defendant's solicitor an opportunity to move the Court if so advised for leave for the umpire to state a special case. This was on the 20th of March 1912. On the 22nd the defendant's solicitor appeared before the umpire and stated that as the umpire had admitted the document containing the adjustment notwithstanding the defendant's objection the arbitration fell through and that the defendant was no longer bound to go on with it. He also said that as the umpire had acted in contravention of the order of reference the defendant put an end to the umpire's authority and retired.

The umpire then requested the plaintiff's solicitor to give notice to the defendant's solicitor that the reference would be proceeded with next day and if he did not attend the reference would be proceeded with *ex parte*. This notice was accordingly given by letter of the same date. The following day the reference was proceeded with *ex parte* and the defendant's solicitor being absent the surcharges remaining to be dealt with were disallowed. The plaintiff was called and gave evidence of the correctness of the steamer account which had been the subject of 222 objections by the defendant after inspection of the account books relating to it.

The plaintiff's solicitor then withdrew his claim to the Rs. 1,300 and interest thereon so that the defendant's

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objections were allowed. He also withdrew a claim with regard to certain bills of costs.

This completed the inquiry and an award followed whereby the sum of Rs. 7,06,639 was awarded to the plaintiff with interest at 9 per cent. and costs.

The learned Judge was of opinion that the adjusted account could, once it was admitted on the record, be used as a deadly and destructive piece of evidence against the defendant, and that, as the defendant had specifically stipulated in the reference that it should not be so used, its admission by the umpire was misconduct and sufficient ground for setting aside the award. In considering whether this view is correct the first question which arises is whether the reference contained any unmistakable stipulation which has been disregarded by the umpire.

It appears to me that the passage in the reference relied upon by the defendant is reasonably susceptible of two constructions. It was either a particular and specific, following upon a general, exclusion of all adjustments *quâ* adjustments; or a stipulation that certain documents containing the adjustments should not be admitted in evidence for any purpose. If the defendant's solicitors intended to provide for complete exclusion of these documents they did not choose words placing their intention beyond dispute. It is possible to admit a document as evidence in support of a particular item and at the same time exclude it as evidence of a general settlement. Thus in *Middleditch* v. *Sharland*[1], a general account was decreed against a steward notwithstanding a receipt in full signed by the principal, which was only allowed as proof of a particular payment and not of a general release or discharge upon an account stated.

[1] (1799) 5 Ves. 87.

The acquiescence of the defendant's solicitor in the admission, as *primâ facie* proof of the item of Rs. 7,053-8-0, of the account containing the adjustment of the 18th of August 1908, and in the cross-examination of the defendant upon the account containing the adjustment of the 31st of August 1910, suggests that the defendant's solicitor did not then think that the documents had been excluded for all purposes by the terms of the reference

It appears from an argumentative paragraph in the defendant's affidavit that the umpire, when he committed the act of misconduct charged against him, conceived an adjustment to be the totalling up of the two sides of an account and the striking of a balance. There is authority for this view. It is stated in Daniell's Chancery Practice (Ch. VIII, s 3, p. 118, 7th edn.) on the authority of *Burk* v *Brown*[1] that "a plea of stated account must show that it was in writing, and likewise the balance in writing, or at least set forth what the balance was."

If the defendant's construction of the order of reference is correct the stipulation relied on was a rule of evidence introduced *pro hac vice*, and the honest though mistaken admission by the umpire of a document in violation of that rule would not be a ground for setting aside the award: see *Ghulam Jilani* v. *Muhammad Hussan*[2]. The scope of the reference was not affected by the mistake.

It appears to me that the action of the defendant was incorrect. The umpire when asked to state a case offered to adjourn consideration of the items under discussion for a week in order to give the defendant an opportunity of obtaining the leave of the Court for the statement of a case under clause 11 of the second Schedule

[1] (1742) 2 Atk 397 [2] (1901) L. R. 29 I. A. 51 at p. 60

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of the Code. I do not think there would have been any difficulty in framing an award so as to raise the point in dispute as was done in *Scott* v. *Van Sandau*[1].

The defendant's rejection of this course and his decision to withdraw from the reference without the leave of the Court suggests uncertainty as to his position, and doubts as to the strength of his case on the remaining items of surcharge and steamer account.

In consequence apparently of the strong line taken by the defendant's solicitor, the plaintiff's solicitor to avoid all disputes gave up the items of Rs. 1,300 and Rs. 26-10 for interest thereon and the award in effect allows the defendant's objections to these items. I doubt whether the admission of the adjusted account in evidence was so fatal to the rest of the defendant's case as the learned Judge thinks. It is pure speculation that it would have been used with fatal effect in resisting the defendant's surcharges. No attempt was made so to use it in the long inquiry into the surcharge of Rs. 5,000. I fail to see also that it would have been of any value on the steamer account items of Rs. 1,270 (objection 30); Rs. 70,893 (objection 32); and Rs. 68,251 (objection 50).

The item of Rs. 1,270 was composed of Rs. 800 for stamp charges and Rs. 470 for transfer fee on 940 shares of the Bombay Steam Navigation Company, as to which evidence must have been easily obtainable.

The items of Rs. 70,893 and Rs. 68,251 were the totals of all items claimed on steamer account for two different periods and the account Ex. H brought in by the plaintiff showing all the items included in those totals was the subject of 222 objections resulting from inspection of the steamer account books. The item of Rs. 68,251 did not appear in the adjusted account at all and the transfer of the objection as to the Rs. 70,893 to the steamer

(1) (1841) 6 Q. B. 237.

account inquiry shows that it was recognised that it must, if the defendant wished, be dealt with item by item on the defendant's steamer account objections.

For the above reasons I am of opinion that the umpire's action does not amount to misconduct and that the interests of justice do not require that his award should be set aside.

The judgment appealed from must be reversed and the motion dismissed with costs throughout on the respondent.

CHANDAVARKAR, J :—This is an appeal from an order of Davar, J. setting aside the award made by Mr. Kaikhashru Framji Modi, as umpire on a reference to arbitration by order of the Court in Suit No. 917 of 1910.

The suit had been brought by the appellant to recover from the respondent the sum of Rs 500,000 and odd due on certain mortgages and other adjusted accounts. In defence the respondent pleaded *inter alia* that the adjustments were vitiated by fraud and misrepresentation and prayed that "proper accounts should be taken by and under the directions of this Hon'ble Court of all the dealings and transactions" between the parties

The cause was, however, referred to arbitration with the consent of the parties by an order of the Court and the material portion of the terms of the reference, with which we are concerned in this appeal, is contained in the provisions in the submission that "the said arbitrators do proceed on the basis of there having been no adjustments and the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration by them."

The arbitrators named in the reference having failed to arbitrate, Mr. Modi, appointed umpire thereby, took their place, and the enquiry before him commenced on

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the 8th of September 1911. At the sitting on the 19th of March 1912, one of the questions before the umpire related to an item of Rs. 1,300 debited by the appellant to the respondent. The question was whether the debit was proved. The onus at the outset lying on the appellant, his solicitor sought to discharge it by tendering in evidence an adjusted account, in which the item appeared, and the signature on which the respondent has admitted in his written statement.

The respondent's solicitor objected to the admissibility of the said adjusted account on the ground that the umpire had no authority, under the terms of the reference, to look at and take into consideration any adjustment between the parties which had been relied upon by the appellant in his suit.

The umpire overruled the objection of the respondent's solicitor and admitted as A 18 the "account purely as a statement of account acknowledged to have been signed by defendant."

In so admitting the statement, Davar, J. has held that the umpire "was guilty of what in law is called misconduct," inasmuch as, the statement having been an adjustment relied upon by the appellant (plaintiff) in his suit, had been deliberately excluded from the umpire's consideration by the express terms of his authority contained in the reference.

The question before us turns upon the proper interpretation of the clause in the reference which provided that "the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration" by the umpire.

It is contended for the respondent that under that clause every adjustment or settled account in the suit was made inadmissible and outside the jurisdiction of the umpire.

On the other hand, the contention for the appellant is that all the clause in question provided was that the umpire should not treat the account stated as an *adjustment* and give it the operation it would have in law as such; but that it did not prevent him from receiving it as an ordinary piece of evidence and considering its weight in that character.

In valuing the comparative force of these rival contentions, we must start with the fact that as the suit had been framed it was on an account stated, so that had it gone to trial in the usual course it was the respondent who would have had to begin his case at the outset and establish his pleas of fraud and misrepresentation before he could get rid of the binding character of the account and become entitled to go behind it and re-open the whole account between the parties. If those pleas were not proved, it was open to him to prove some one mistake at least in the account stated before he could get the right to surcharge and falsify. In the latter case, notwithstanding the mistake proved, the account stated would have continued to retain its character as such in law and the only liberty allowed to the respondent would have been to prove that certain items had been wrongly credited or wrongly omitted in *the* account; but he would not have been allowed to go into the general account. In either case, the account stated would have been a bar to all discovery and relief unless the respondent had first established his right to open the account either wholly or partially. (See Story's Equity, 2nd Edn. English, section 523, p. 346; *Gething* v. *Keighley*[1].) The law on the subject is even more tersely but clearly stated in Coote's Law of Mortgage (5th Ed.): "In every case the account stated is

[1] (1878) 9 Ch D. 547.

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liable to be opened for fraud, or, the party will be allowed, in case of specific error alleged and proved, to surcharge and falsify. He cannot, however, in the latter case go into the general account, though fraud will be a sufficient ground to open the whole account."

When, therefore, the suit was referred to arbitration, the terms of the reference relieved the suit from its nature as an action on an account stated and directed the arbitrators, and on failure of them the umpire, to treat it as a suit for a general account between the parties. The respondent became entitled to go behind the account stated, without any restrictions as to proof of fraud or specific error and to get discovery. The reference required the umpire not to take "the adjustments" into consideration, *i.e.*, not to look at them *quâ* adjustments; and not to give them the legal character and operation which an account stated has. But that did not prevent him from looking at them in any other light, so long as he did not, by treating the adjustments as accounts stated, deprive the respondent of his right under the terms of the reference to go into the general account and to discovery.

In my opinion, therefore, the language of the terms of the reference is in favour of the appellant's construction that all the umpire was restricted to was the consideration of the accounts stated in the suit in the light of *adjustments*. The language used is apt for the purposes of that construction, when the reference says that the umpire shall not take into consideration "the adjustments". In plain English it means, he shall not consider the fact that there has been any adjustment. The submission does not say that he shall not receive the account in evidence and consider it at all, whether as an adjustment or otherwise.

In any case, the language used may fairly be said to be ambiguous, and extrinsic evidence can be admitted to explain the real meaning. We have that evidence afforded by the conduct of the parties in the earlier stage of the enquiry before the umpire to show what meaning they all attached to the term of the reference which has led to the present dispute.

We find from the proceedings that the enquiry before the umpire having begun on the 8th of September 1911, on the 4th of October 1911 an *adjustment* or account stated (statement marked B) was tendered in evidence by the appellant's solicitor on the ground that by means of the adjustment and his written statement the respondent had admitted the execution and receipt of consideration and that under those circumstances the *onus* of proving that the respondent had not received the moneys of the item then under discussion lay on the respondent. Respondent's solicitor did not then object to the statement B, which was an adjustment relied upon by the appellant in this suit, going in on the ground that by the term of the reference the umpire had no authority to receive it as a piece of evidence and treat it as such. On the other hand, he said he could not dispute the proposition of law, urged by the plaintiff's solicitor. The result was that, the respondent's solicitor not objecting, the statement B was put in. Further in examining his client, respondent's solicitor put questions to him with reference to some of the adjustments (see p. 20 of part II of the Paper Book); and respondent admitted having signed "another statement of account," besides B. The appellant's solicitor then produced another statement but in answer to his solicitor respondent could not say whether that was the other statement which he has signed. That statement was then marked M. I. for the identification; and res-

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pondent was asked questions with reference to it. And it is this very statement which on the 19th of March was objected to by respondent's solicitor as outside the umpire's authority and jurisdiction when the appellant's solicitor tendered it in evidence as a mere admission. The objection came very late then; and the previous conduct of the respondent at the enquiry is sufficient to show what meaning he in common with the plaintiff had attached to the term of the reference which is now in dispute. And if that meaning is admissible, we should accept it in preference to the other, which, if acted upon, makes all the proceedings held, and the expenses incurred at the enquiry before the umpire, abortive.

But it has been urged for the respondent before us that the result of the admission in evidence of the adjustment A 18 was practically such as to give it the character and operation of an account stated, the very thing which the terms of the reference had prohibited, inasmuch as the moment the adjustment went in, as a piece of evidence it might be, the umpire was at liberty to consider it and hold that it shifted the onus of proof as to the item of Rs. 1,300, for which it was admitted or any other item in the said account, on to the respondent. That was so no doubt; but there was still an important difference between the character of the onus so shifted had the account retained the aspect of an account stated, and the nature of the onus thrown on the respondent by the admission of the account as an ordinary piece of evidence. In the former case, the respondent could not have sought discovery and the right to go into the whole account without laying the foundation for his right thereto by proving fraud or misrepresentation. Or, if fraud and misrepresentation failed, he could have, in the event of any specific error in the account stated proved, only secured

the right to surcharge and falsify but not the right to go into the general account. He could not have called upon the appellant to produce his books and discover his documents before removing the preliminary bar in his way in either case. But for the purposes of the reference that bar stood entirely removed; when the account stated (A 18) went in, there was nothing to prevent him from at once calling for discovery and going into the general account, without regard to proof of fraud or misrepresentation or mistake concerning the account stated.

Had the parties intended to shut out the adjustments absolutely even as mere admissions, not having the operation of an account stated, they could have taken care to say so and ought to have said so in the submission in distinct terms and refrained from dubious language, which laid a trap, as it were, for the umpire and made it open to either party to repudiate the reference after all the labour and expense of arbitration had been undergone. If, again, respondent felt that the umpire was exceeding his authority by misconstruing an important term of the reference he could have sought the help of the Court and asked it to construe the term and facilitate the arbitration.

I think the circumstances of this case are such as to make applicable to it the observations of Alderson, J. in *Faviell* v. *Eastern Counties Railway Co.*[1]. There the claims referred to arbitration were "an action of debt." But the plaintiff claimed before the arbitrator a sum for extra expenses which could be recovered only as damages, not debt The arbitrator, in spite of defendant's protest, received the evidence of the extra work, and gave an award in respect of it in plaintiff's favour. The Court declined to set aside the award and treat it as a nullity, and Alderson, J., one of the Judges

[1] (1848) 2 Ex 344

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who composed the Court, said :—"when the defendants saw the arbitrator entertaining a question which he ought not to entertain, it was their duty to interpose and apply to a Judge for the purpose of being allowed to revoke the submission, which, no doubt, would have been granted, had it appeared by affidavit that the arbitrator intended to exceed his jurisdiction. The question as to the construction of the submission would then have been raised before the Judge; but, instead of doing that, the defendants, though they find the arbitrator going on, do not interpose, but make the question one for his determination, and he has determined it." Similar was the case here. The respondent's solicitor objected before the umpire that the account stated could not be looked at, whether as an adjustment or otherwise and that by admitting it the umpire would exceed his jurisdiction. But the solicitor did not seek the interposition of the Court for a proper construction of the term of the reference; he withdrew from the case; and allowed the enquiry to go on; and it was only when the award had been made that the respondent asked for the interposition of the Court to interfere and set aside the award as a nullity. I think it would be bad law and injustice if under the circumstances of the case and having regard to the language of the reference defining the umpire's jurisdiction we were to hold that the award was void and the enquiry before the umpire was all infructuous.

On these grounds I concur in holding that the appeal should be allowed and the order appealed from should be set aside with costs.

Attorneys for the appellant: *Messrs. Payne & Co.*

Attorneys for the respondent: *Messrs. Ardeshir, Hormusji, Dinshaw & Co.*

Order set aside.

H. S. C.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

BURJORJEE DHUNJIBHOY CONTRACTOR, APPELLANT AND DEFENDANT, v. JAMSHED KHODARAM IRANI, RESPONDENT AND PLAINTIFF.* 1913 *January* 31.

Indian Contract Act (IX of 1872), section 55—Contract, when time of the essence of—Contract for the assignment of leasehold property, effect of the insertion of a definite date for completion and payment of the purchase money with conditions as to forfeiture of the earnest money and liberty for the vendor to re-sell—Certificate of lessor that conditions of lease have been complied with not necessary.

C agreed to sell to I his interest in a property, held on lease from the Secretary of State for India, on certain conditions as to improvement for cultivation etc., and, as to not assigning or underletting the lands until these conditions had been carried out without the consent in writing of the Collector of Thana, for Rs. 85,000, of which Rs. 4,000 was paid on the execution of the agreement and it was agreed that Rs. 80,500 should be paid on the signing of the conveyance, which was to be prepared and received within 2 months from the date of the agreement, and Rs. 500 on the transfer of the land after the conveyance should have been registered. It was further provided that should I. not have paid the amount of the purchase money within the time fixed then he should forfeit his right to the earnest money and C should be at liberty to re-sell the property.

Held, that under the agreement time was of the essence of the contract.

Held, further, that I could not insist on C procuring a certificate from the Collector of Thana that all the conditions of the lease from the Secretary of State for India had been complied with.

IN this suit the defendant appealed against a decree passed by Mr. Justice Macleod for the specific performance by the defendant of an agreement for the sale of certain property of the defendant.

The material facts of the case were as follows.

By a writing in Marathi, dated the 12th of September 1898, the Secretary of State for India granted a lease to one Motabhoy Bhicaji of a piece of land at Palghar in

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the Thana District, admeasuring 2,334 acres and 2 gunthas, for the term of 999 years from the 1st of August 1890 on certain terms, including a provision that the lessee should improve the land for cultivation within 10 years from the 1st of August 1890, which period was subsequently extended for a further period of 10 years, and that until the land was so improved the lessee should not transfer or sublet any portion of it without the previous consent in writing of the Collector of Thana and that in the event of a breach of any of the conditions contained therein the lease should be deemed to have determined and the lessor should be entitled to re-enter.

On the 18th of October 1908, Motabhoy Bhicaji sold his interest in the property to the defendant.

By an agreement in Gujarati dated the 8th of July 1911, the defendant agreed to sell his interest in the land at Palghar to the plaintiff and by clause 1 agreed *inter alia* to show a marketable title to the land from the title deeds.

The following clauses of the agreement are also material.

2 The Packa (formal) sale (conveyance) of this land is to be prepared and received within two months from this day. At the time of signing the document of sale Rs 80,500 are to be paid And as to the balance of Rs. 500, the same is to be paid on the transfer of the land (after) the document shall have been registered

5. On payment of Rs 81,000 by the purchaser to the vendor as mentioned in the above clause 2, the document of sale (conveyance) is to be got executed by the vendor But should I (meaning the purchaser) not pay the amount within the fixed period given (herein) then I shall have no right (or claim) to Rs 4,000 paid this day to you under this bargain paper as earnest-money on account of (this) sale And if I prefer (any) claim, the same is null (and void) And after this date the vendor of this property has authority in every way to sell the same to another.

7. The boundaries (limits) of the above property are to be shown and the (boundary) marks are duly to be made (? fixed) by the vendor at his expense

and are to be given to the purchaser. The grass (growing) on this land for the current monsoon has been given (sold) for Rs 10,500 The vendor is duly to give credit for that amount to the purchaser.

There was also a subsidiary agreement made at the same time providing for sale of a property of the plaintiff at Elphinstone Road, Bombay, to the defendant for Rs. 30,000, which sum was to be retained by the purchaser out of the purchase money for the Palghar property.

After the said agreement had been made the plaintiff's attorneys commenced to investigate the defendant's title to the Palghar property. On the 21st of August 1911 they made requisitions of title *inter alia* calling on the defendant to prove the death of one Mangalji Ishwarbhai and also that Chimanlal Mangalji who purported to execute the deed of conveyance of the 28th of October 1908 was the only son and heir of the said Mangalji Ishwarbhai. In answer the defendant replied that he had no evidence of the matters referred to except the recitals contained in the deed of conveyance of the 28th of October 1908. The plaintiff's attorneys professed themselves not satisfied with this answer and there was further correspondence on the subject. On the 4th of October 1911 the defendant gave the plaintiff all the information within his knowledge on the question in dispute. On the 6th of October the plaintiff's attorneys informed the defendant's attorneys that they would submit the defendant's answers to counsel for advice and would abide by his decision.

By their requisitions the plaintiff's attorneys further inquired whether the defendant had obtained permission from the Collector of Thana for the transfer of his interest in the Palghar land to the plaintiff and whether the whole land had been reclaimed as provided for in the lease. In answer to the first inquiry the defendant stated that as the land was completely

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reclaimed and rendered cultivable the permission of the Collector was not necessary. In answer to the second inquiry the defendant referred the plaintiff to a letter dated the 13th of October 1906 from the Collector of Thana to the defendant in reply to an application made by the latter for the transfer of the Palghar land from the name of Motabhoy Bhicaji to the defendant's name, in which letter the Collector stated that the land could be transferred in accordance with the conditions of the lease as it was fit for cultivation "as batty and varkas land."

The defendant's attorneys also carried on a correspondence with the Collector of Thana on the question whether the conditions of the lease had been carried out but did not obtain any information on this point which they considered satisfactory before the cancellation of the agreement on the 6th of October 1911.

While this correspondence was going on the defendant's attorneys were pressing the plaintiff to complete the sale. On the 6th of September 1911 when the time fixed for completing the sale had not expired and the draft conveyance of the plaintiff's Elphinstone Road property which was to be prepared by the defendant's attorneys was not yet ready, the defendant's attorneys wrote to the plaintiff proposing that either party should deliver to the other possession of the property agreed to be sold by him, that the plaintiff should pay to the defendant the balance of the purchase money and that the deeds of sale might be executed when the same were ready. On the 7th of September the defendant's attorneys wrote to the plaintiff's attorneys stating that as the plaintiff had failed to carry out the contract, the contract was at an end and that the sum of Rs. 4,000 paid by the plaintiff to the defendant as earnest-money was forfeited to the defendant. On the 8th of September 1911, however, the defendant on the plaintiff's protest offered to extend

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the time for completion till the 19th of September 1911, if the plaintiff would agree to pay interest on the balance of the purchase money at 9 per cent. per annum. On the 23rd of September 1911, the defendant offered to extend the time for completion by 4 days. On the 6th of October 1911, the defendant finally cancelled the agreement

Subsequently the plaintiff received information which induced him to believe that he would run no serious risk if he then completed the transaction and by a letter of the 13th of October 1911, he offered to complete the same but the defendant did not answer his letter.

The plaintiff submitted that he was justified in making the inquiries he had made and that the delay in the completion of the transaction was inevitable under the circumstances. He submitted that the time fixed in the agreement for completion was not of the essence of the contract and that though time expired on the 8th of September 1911, the plaintiff's offer to complete made on the 13th of October 1911 was made within a reasonable time from the date of the agreement.

The defendant submitted that time was of the essence of the contract under the agreement or in the alternative was made so by the letter of the defendant's attorneys on the 13th of June 1911. The defendant stated that the plaintiff was reminded that time was of the essence of the contract in correspondence but that not having monies sufficient to pay the balance of the purchase money the plaintiff was in search of a mortgagee to lend him the monies and was guilty of great delay in investigating the defendant's title and in producing the deeds of the property which he had agreed to sell to the appellant The plaintiff had further changed his attorneys from time to time during

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the correspondence concerning the defendant's title, the reason suggested by the defendant being that such attorneys were the attorneys of different prospective mortgagees from whom the plaintiff was trying to raise a loan to pay the purchase money. The defendant submitted that he was entitled to cancel the agreement.

The suit came on for trial before Mr. Justice Macleod on the 30th of July 1912 and was decided in favour of the plaintiff. As to the question of whether time was not of the essence of the contract under the agreement between the parties, the learned Judge held as follows :—

"The first issue is whether time was not of the essence of the contract under the original agreement of 8th of July 1911. The agreement is in Marathi, but its form is practically equivalent to the usual form of an English agreement for sale which contains a clause to the effect that the purchase shall be completed within a particular period, and if not completed within that period, the earnest money will be forfeited and the vendor will be at liberty to re-sell. That clause has never been considered by the Court as making time the essence of the contract. It is to be noted that there is no special provision as often appears in such an agreement that in this respect time is of the essence of the contract. Under section 55 of the Contract Act when a party to a contract promises to do a certain thing at or before a specified time, or, certain things at or before specified times and fails to do any such thing at or before the specified time the contract, or so much of it as has not been performed, becomes voidable, at the option of the promisee if the intention of the parties was that time should be of the essence of the contract. There is no express declaration in this contract that time should be of the essence of the contract, and even if those words did appear I do not think that a Court of Equity would construe them as being an express stipulation in the absence of particular circumstances. However, in this agreement (it must be read as it stands) there are no such words which make time of the essence of the contract. The agreement merely states that the purchase shall be completed within two months and that if it is not so completed the earnest money shall be forfeited and the vendor will have the right to sell. No doubt after the agreement the defendant did write to the plaintiff making out that time was of the essence of the contract. But it is not so in the contract, and it cannot be so made after the contract within the time unless by an express consent of the parties. It was argued that some passages in the letters written by the plaintiff's solicitors show that plaintiff had agreed to the defendant's conten-

tion that time was of the essence of the contract but I do not read them in this way. That being the case, there being no express stipulation to make time of the essence of the contract, it follows that the usual rule applies, namely, that if the contract is not fulfilled within the stipulated time, the vendor can make time of the essence of the contract by giving notice to the purchaser; only the notice must give the purchaser reasonable time to complete the contract The extension of time from the 8th to the 19th of September given by Messrs Bicknell, Merwanji and Romer's letter of the 8th September was under the circumstances of this case clearly insufficient and equity would certainly relieve if the purchase was not completed by that date, but it appears from the correspondence that the plaintiff's delay was not unjustifiable, that the matter could not be pushed through in a hurry and that as regards the final approval of the draft assignment there was delay on both sides It is quite true that if time has once been made of the essence of the contract, the further extension of time given by the vendor is not to be treated as a waiver of his rights. But as I am of opinion that time was never properly made of the essence of the contract, the further extensions granted by the vendor are not of much importance In any event they were of so short a nature that the time provided by them was also insufficient Therefore I come to the conclusion that the defendant had no right whatever to cancel the agreement on the 6th of October and that the plaintiff was entitled to specific performance of the contract "

The learned Judge also held :—

"It appears to me that the English cases cited on this question are not applicable to transfers of land in India by assignment of leases granted by the Secretary of State Such a lease is very different from an ordinary lease of house property in England It seems to me that the transferee is entitled to see before he accepts a transfer that Government has agreed to the transfer and are satisfied that the transferor has not committed any breach of his covenants which could operate as a forfeiture "

The appellant appealed.

Raikes, with him *Inverarity*, *Tarapoorvala* and *Desai*, for the defendant-appellant :—

Refers to Halsbury's Laws of England, Vol. VII, pages 413 and 414; Fry on Specific Performance, paragraph 1075, page 527 and paragraph 1086, page 532; *Hudson* v. *Temple*[1]; *Nokes* v. *Kilmorey*[2]; *Tilley* v. *Thomas*[3].

[1] (1860) 29 Beav 536. [2] (1847) 1 De G & Sm. 444.
[3] (1867) L. R. 3 Ch 61 at pp 66 and 67

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As to express stipulation, refers to *Parkin* v. *Thorold*[1]; *Roberts* v. *Berry*[2]; *Webb* v. *Hughes*[3]; *Patrick* v. *Milner*[4]; *Hatten* v. *Russell*[5].

To find the intentions of the parties you can look into their declarations either at the time or subsequently but within a reasonable time: *Seton* v. *Slade*[6]; *Nokes* v. *Kilmorey*[7]; *Gedye* v. *The Duke of Montrose*[8].

Jinnah, with him *Strangman* (Advocate General) and *Kanga* for the plaintiff-respondent.

Refers to *Green* v. *Sevin*[9].

Clause 5 of the contract is the usual clause and does not make time of the essence: see *Parkin* v. *Thorold*[1].

What authority is there for the reliance of the defendant on his solicitor's letters. The only passage in favour of this is in *Seton* v. *Slade*[6].

[Court refers to *Gedye* v. *The Duke of Montrose*[8].]

Refers to Leake on Contract (6th Edition) at pages 615 and 616

There is not a single case of a forfeiture clause being construed as making time of the essence. The nearest case is *Parkin* v. *Thorold*[1].

[*Per curiam*: there need not be the words "Time shall be of the essence," see *Hudson* v. *Temple*[10].]

I conclude that there may be a paraphrase of the words. Refers to Dart, page 179.

(1) (1852) 16 Beav. 59 at p. 62.

(2) (1852) 16 Beav. 31

(3) (1870) L. R. 10 Eq. 281.

(4) (1877) 2 C. P. D. 342.

(5) (1888) 38 Ch. D. 334.

(6) (1802) 7 Ves. 265 at pp. 278 and 279

(7) (1847) 1 De G. & Sm. 444

(8) (1858) 26 Beav. 45.

(9) (1879) 13 Ch. D. 589 at p. 599

(10) (1860) 29 Beav. 536

The express stipulation in *Hudson* v. *Temple*[1] is "right to annul." There is no such clause in the present case.

If time were of the essence of the contract you need not annul it. The contract is necessarily at an end if not completed in that time; Fry on Specific Performance, 5th Edition, page 532, paragraph 1086.

The presence of the clause *re* interest was not part of the *ratio decidendi* in *Parkin* v. *Thorold*[2].

Also refers to *In re Gloag and Miller's Contract*[3]; *In re Moody and Yates' Contract*[4]; Fry on Specific Performance, page 536; Dart pages 501 and 503; *Barclay* v. *Messenger*[5]; *Ringer* v. *Thompson*[6]

Raikes replies.

Refers to Dart, page 366; Sugden on Vendors and Purchasers, pages 439, 546 and 548; *Cutts* v *Thodey*[7]

Jinnah, replies on cases cited.

Refers to *King* v. *Wilson*[8]; *Pegg* v. *Wisden*[9].

SCOTT, C. J.:—This is an appeal from a decree for specific performance passed by Mr. Justice Macleod at the instance of a purchaser of immoveable property.

The contract for sale was made on the 8th of July 1911 in the Gujarati language. The subject-matter was certain land situate at Kelva-Mahim belonging to the defendant which had been taken from Government on lease for 999 years under what are known as the Gujarat Rules, the lease commencing from the 1st of August 1890. The purchase-money was fixed at Rs. 81,000 which by the agreement now under consideration was to be

(1) (1860) 29 Beav. 536
(2) (1852) 16 Beav 59
(3) (1883) 23 Ch. D. 320
(4) (1885) 30 Ch D 344
(5) (1874) 22 W R 522
(6) (1881) 51 L J Ch 42
(7) (1842) 13 Sim 206
(8) (1843) 6 Beav 124
(9) (1852) 16 Beav 239

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paid as to Rs. 80,500 at the time of signing the document of sale and as to the balance on the transfer of the land after registration. The provision as to the payment of the consideration-money appears to have been varied by another agreement of even date under which in lieu of Rs. 30,000 part of the consideration the defendant agreed to take a property belonging to the plaintiff situate at Parbhadevi in Mahim within the Island of Bombay. The agreement for sale contained three clauses which are of special importance with reference to the questions arising in this case, *viz.*, clauses 2, 5 and 7.

2. The pakka (formal) sale (conveyance) of this land is to be prepared and received within two months from this day. And at the time of signing the document of sale, Rs. 80,500 are to be paid. And as to the balance of Rs. 500, the same is to be paid on the transfer of the land (after) the document shall have been registered

5 On payment of Rs 81,000 by the purchaser to the vendor as mentioned in the above clause 2, the document of sale (conveyance) is to be got executed by the vendor. But should I not pay the amount within the fixed period given (herein) then I shall have no right (or claim) to Rs 4,000 paid this day to you under this bargain paper as earnest-money on account of (this) sale And if I prefer (any) claim, the same is null (and void) And after this date the vendor of this property has authority in every way to sell the same to another.

7. The boundaries (limits) of the above property are to be shown and the (boundary) marks are duly to be made (? fixed) by the vendor at his expense and are to be given to the purchaser. The grass (growing) on this land for the current monsoon has been given (sold) for Rs. 10,500. The vendor is duly to give credit for that amount to the purchaser.

The agreement was entered into at the beginning of the monsoon and the price realised by the monsoon grass-crop, which would be reaped probably in September, was to be credited to the purchaser against his purchase-money, presumably on the assumption that he would have come into possession by the time the crop was reaped. After the conclusion of the agreement, the matter was taken in hand on behalf of the plaintiff

by Messrs. Little & Co. and on behalf of the defendant by Messrs. Bicknell, Merwanji and Romer. The correspondence between these firms of solicitors during the first two months after the execution of the agreement shows that both the parties believed completion within the time stated to be essential; and requisitions were made by the plaintiff's attorneys and answered by the defendant's attorneys upon that basis until the early part of September when the plaintiff changed his attorneys. A change of front then took place on the part of his advisers and it was for the first time denied that time was of the essence of the contract. Objections which had been dropped by Messrs. Little and Co. were revived by their successors Messrs. Mulla and Mulla, notwithstanding constant pressure by the vendor's solicitors and limited extensions of time until the defendant's patience being exhausted the contract was finally cancelled. Thereupon the objections which had been persisted in were waived and a suit was commenced for specific performance.

The questions arising are: Whether time was originally of the essence of the contract; if not, whether it was made so subsequently; and if it was for either reason of the essence of the contract, whether the non-completion within the time limited was due to the fault of the vendor or of the purchaser.

The learned Judge was of opinion that under the contract time was not of the essence. If, however, that is the correct conclusion, it is difficult to see with what object clause 5 can have been inserted, which provides that if the purchaser does not pay the amount within the fixed period of two months from the 8th of July he shall have no claim to the desposit-money, and no claim under the contract, and the vendor may sell as he pleases to anyone else. The law in India is contained in section 55 of the Contract Act under which in order

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to render a contract voidable on failure to perform a particular promise at or before a specified time it is necessary that an intention should be shown by the parties to make time of the essence of the contract. It is argued that clause 5 cannot be relied upon as a real indication of the intention of the parties having regard to the decisions of Lord Eldon in *Seton* v. *Slade*[1], and of Lord Romilly in *Parkin* v. *Thorold*[2]. The contract in each of those cases contained a clause for forfeiture and re-sale on non-performance of conditions, but that clause had no bearing upon the decision in either case as the rescinding party was the purchaser and the clause in question was directed merely to declaring the rights of the vendor arising upon the default of the purchaser. Where, however, the vendor has rescinded the contract, a clause providing for forfeiture of the deposit and re-sale or for annulment of the contract has had full effect given to it, the principle being that a contract both at law and in equity must have the same meaning. Equity only did not enforce a contract where there was certain conduct on the part of one party or the other which would make it unjust to enforce the contract according to its terms. According to the report of *Lloyd* v. *Collett*[3], Lord Eldon said : "It is one thing to say, the time is not so essential that, in no case in which the day has, by any means, been suffered to elapse, the Court would relieve against it, and decree performance. The conduct of the parties, inevitable accident, etc. might induce the Court to relieve. But it is a different thing to say the appointment of a day is to have no effect at all ; and that it is not in the power of the parties to contract that, if the agreement is not executed at a particular time, the parties shall be at liberty to rescind it." In *Seton* v. *Slade*[1] he said " there

(1) (1802) 7 Ves. 265
(2) (1852) 16 Beav. 59.
(3) (1793) 4 Bro. C. C. 469 at p. 471.

is no authority, that has not some reference to the conduct of the party in the meantime." The later cases of *Hudson* v. *Temple*[1] and *Barclay* v. *Messenger*[2] are authorities in favour of the contention that clause 5 of this contract ought to be given effect to according to its terms. I am not aware, and the Court has not been informed, where the learned Judge obtained his authority for the sweeping statement that a clause providing that upon non-completion within the fixed period the earnest-money will be forfeited and the vendor will be at liberty to re-sell has never been considered by the Courts as making time as of the essence of the contract.

Time, then, being in my opinion of the essence of the contract as it was originally framed, no waiver of that condition has been pleaded by the plaintiff. The question, therefore, is whether the negotiations following upon the contract with reference to the making out a marketable title by the defendant disclosed any conduct on his part which would render it inequitable for him to rescind the contract contrary to the wishes of the plaintiff. From the commencement of those negotiations there had been only two points upon which the purchaser's solicitors were not immediately satisfied.

The first arose upon the terms of the lease which had been granted by Government to Motabhai Bhikaji under which the vendor claimed title. That lease was a lease for reclamation of certain salt marsh lands under which the lessee covenanted to completely reclaim the lands so as not to allow tide or salt-water to enter upon them and to bring them under cultivation by a certain period and to maintain the reclamation for the residue of the term, and that he would not assign or underlet the lands, until the whole should have been completely reclaimed and rendered cultivable, without the previous consent in writing of the Thana Collector.

(1) (1860) 29 Beav. 536. (2) (1874) 43 L. J. Ch. 449

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The agreement for sale to the plaintiff contained, the following recital :—" The purchaser has seen this land and has received copies of the lease and of the Collector's reply and he has satisfied himself thereby ". It is common ground that the Collector's reply referred to in the recital was a letter addressed by the Collector of Thana to the vendor which was signed on the 13th November 1906 in answer to an application that the land held by Motabhai might be transferred to the vendor. It stated (as regards the lands the subject of this suit) that as the entry of salt-water had been stopped according to the terms of the lease and paddy grain and grass were grown thereon and the same were rendered cultivable, there was no objection to the transfer, and the applicant Motabhai might arrange with the Mamlatdar to have the transfer effected.

The lease itself bears an endorsement, dated the 29th of July 1908, signed by the Collector of Thana reciting the application of the vendor and that in accordance with the order of the 13th November 1906 the transfer had been effected to his name.

Notwithstanding these facts appearing on the title-deeds produced by the vendor, the purchaser's attorneys sent in a requisition that the permission of the Collector to the proposed assignment of the lease should be obtained. The vendor's attorneys contended this was unnecessary and in answer to another requisition produced receipted bills for the Government rent or assessment up to date. The purchaser's attorneys were satisfied by the 1st of September that the lands agreed to be sold were identical with those referred to in the Collector's sanction and in the rent-bills ; and as to the question of the Collector's permission to the proposed transfer by the vendor confined themselves to further communications with the Collector with the result that that officer informed them on the 11th of September

that he had no objection to the proposed assignment. At that time the defendant had for the convenience of the plaintiff but without prejudice extended the time for completion until the 19th of September.

In my opinion the purchaser was never in a position to contend that the sanction of the Collector was necessary and the attitude taken up after the change of attorneys that completion must be delayed until the Collector had certified that all conditions of the lease had been complied with had no justification in face of the proof produced of payment of rent up to date; see *Bridges* v. *Longman*[1]; *Attorney-General of Victoria* v. *Ettershank*[2]; and *Davenport* v. *The Queen*[3].

The only other point as to which the purchaser's attorneys were not immediately satisfied was with regard to the devolution of the interest of one Mangalji Ishwarbhai who had been a co-mortgagee with the defendant of the interest of Motabhai. Motabhai had mortgaged his interest under the lease to the defendant and three Hindus who contributed part of the mortgage-money on joint-account. The Hindus represented, as appears from the recitals in the title-deeds, the firms of Motichand Khetsey and Raochand Oojamchand. Mangalji Ishwarbhai and Hathibhai Ishwarbhai represented Motichand Khetsey, and Nagindas Lalloobhai, Raochand Oojamchand. Mangalji died in 1904 and a conveyance of the equity of redemption by the mortgagor, on the 28th of October 1908, had been taken by the defendant, by Nagindas Lalloobhai as representing his firm of Raochand Oojamchand and by Chimanlal Mangalji and Hathibhai Ishwarbhai as representing the firm of Motichand Khetsey.

In that document and in another document of even date, whereby the defendant became sole owner of the

(1) (1857) 24 Beav. 27. (2) (1875) L. R. 6 P. C. 354.
(3) (1877) 3 App. Cas. 115.

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property by buying out his co-owners, were recitals stating that Chimanlal was the only heir of Mangalji. With reference to these recitals the plaintiff's attorneys required evidence of the death of Mangalji and as to who were his next of kin and that his son Chimanlal had power and authority to sign the deed of the 28th October 1908 and give a good receipt for the consideration binding on all members of the family. The defendant's attorneys' reply on the 1st of September 1911 was that the vendor was well acquainted with the deceased and knew the recital to be correct but he could not produce any other evidence.

There the matter rested till the 16th of September when the plaintiff's new attorneys took up the requisition again. The defendant's attorneys adhered to their original position throughout in spite of frequent letters from the plaintiff's attorneys and finally when the latter realised that the defendant's patience was exhausted the requisition was dropped

It appears to me that the attitude of the plaintiff's new attorneys was in this matter also quite unreasonable. The deeds of the 28th of October had been executed in Bombay by a constituted attorney of Chimanlal and Hathibhai who was a resident of Bombay and in the presence of a Bombay pleader. The recitals in the deeds indicated that the interest acquired and surrendered to the defendant by Chimanlal and Hathibhai was the interest of a firm of which one at least of the original partners, Hathibhai, was a party to the deeds.

There is nothing in the correspondence to show that inquiries in Bombay had suggested doubts as to the correctness of the recitals or of the defendant's assurances. After the 1st of September 1911 the subject was not again referred to by Little and Co. as long as they acted for the purchaser. On the 5th of September they wrote

that the assignment from the vendor was being prepared and when ready would be sent for approval, and on the 6th the vendor's attorneys wrote in reply, "We take it that your client accepts our client's title". This appears to me to be the correct conclusion, for the purchaser's attorneys had written to the Collector on the 1st September as follows .—

"From your silence we gather that the Government have no objection to the assignment from Mr Burjorji Dhunjibhoy Contractor to our abovenamed client of the land under Survey Nos 835, 836, 934 and 942 leased by the Secretary of State for India and referred to in the said letter of 26th July last and that sanction is not necessary Upon that supposition our client will after the 7th instant complete the purchase, which please note"

And although the Collector had replied in a non-committal manner on the 4th as follows :—

"With reference to your letter No 9037/11 of the 1st September 1911, on behalf of your client Mr Jamshed Khodaram Irani regarding the assignment of leasehold lands in the Mahim Taluka, I have the honour to inform you that your previous applications are under enquiry and a reply will be given to you on receipt of the Mamlatdar's report If in the meantime your client makes the assignment without the Collector's permission he does it at his own risk."

Messrs. Little & Co. put the assignment in hand.

The truth seems to me to be that the plaintiff had not even on the 19th of September money to complete the contract according to its terms.

Having arranged to make up the price as to Rs. 30,000 by the transfer of his Parbhadevi property to the defendant, he was still in want of money and suggested on the 22nd of September that for the balance the defendant should finance him by taking a mortgage upon certain terms. There are various other indications in the correspondence that the defendant's real difficulty was in finding money to complete his contract.

In my opinion the defendant was in no way to blame and was justified in putting an end to the contract under the circumstances.

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The defendant is entitled to retain the deposit of Rs. 4,000: see *Howe* v. *Smith*[1] and *Bishan Chand* v. *Radha Kishan Das*[2].

We reverse the decree of the lower Court and dismiss the suit with costs throughout.

Attorneys for the appellant: *Messrs. Bicknell, Merwanji, Romer & Co.*

Attorneys for the respondent: *Messrs. Mulla and Mulla.*

Decree reversed.

H. S. C.

[1] (1884) 27 Ch D 89 [2] (1897) 19 All 489.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Beaman.

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MAHABLESHVAR KRISHNAPPA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. RAMCHANDRA MANGESH KULKARNI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Limitation Act (IX of 1908), section 7, schedule I, article 44—Joint Hindu family consisting of minors and widows—Manager—*Mukhtiarnama *executed by manager—Management by the* mukhtiar *during the life-time and after the death of the manager—Sale by the* mukhtiar *after the death of the manager—Binding effect—Minor—Limitation to set aside sale*

K, the manager of a joint Hindu family consisting of minors and widows, executed a *mukhtiarnama* providing for the management of the family estate, including settlement of money debts and pecuniary claims both during his life-time and after his death until his eldest minor son attained majority. The *mukhtiar* was empowered to manage the estate as he thought fit including the power of sale and settle claims as K himself could have done during his life-time In connection with the registration of the *mukhtiarnama*, the Sub-Registrar examined the widows in the family including the widow of K, the manager, who had died in the meanwhile, and the deed was registered as the widows admitted the same. Subsequently the *mukhtiar* sold *mulgeni*

* Second Appeals Nos. 160 and 161 of 1910.

(leasehold) rights of the family in certain lands for valuable consideration. K's eldest son having attained majority on the 10th December 1894, he with his minor brother brought a suit on the 17th May 1899, to recover possession of the property alleging that the sale of the *mulgeni* (leasehold) rights was void *ab initio*.

The lower Courts having dismissed the suit, on second appeal by the plaintiffs,

Held, that (1) the sale by the *mukhtiar* was binding on plaintiffs as having been within the authority conferred by the *mukhtiarnama*.

(2) The sale could not be treated as a nullity inasmuch as a dying adult Hindu might appoint a manager and trustee for the minors themselves without interfering with the succession to the property

Raj Lukhee Dabea v *Gokool Chunder Chowdhry*(1) and *Soobah Doorgah Lal Jha* v *Rajah Neelanund Singh*(2), referred to

(3) The right of plaintiff 1, if any, to challenge the sale was barred at the date of the suit under article 44, schedule I of the Limitation Act (IX of 1908) by reason of his failure to sue within three years of his attaining majority

(4) Plaintiff 2, a minor, was also barred under section 7 of the Limitation Act (IX of 1908) inasmuch as plaintiff 1 after attaining majority could have bound the minor plaintiff if he had chosen to give a discharge and acquittance of all claims to the defendants in respect of *mulgeni* (leasehold) interests, as manager

SECOND appeal against the decision of T. Walker, District Judge of Kanara, confirming the decrees, one passed by E. F. Rego and the other passed by K. R. Natu, Subordinate Judges of Kumpta in two suits.

Companion suits, one to recover possession of property and the other to recover money due under a mortgage.

On the 3rd August 1886 one Krishnappa, manager of an undivided Hindu family consisting of minors and widows, executed a *mukhtiarnama* in favour of Manjappa appointing him guardian of his two minor sons, Mahableshvar and Ramkrishna, plaintiffs 1 and 2, two minor nephews and a minor grand-nephew. The said guardian *mukhtiar* was given the power to manage the

(1) (1869) 13 Moo. I. A. 209. (2) (1866) 7 W. R. 74

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Should it be necessary to find the age of plaintiff 2 Ramkrishna, I hold on exhibit 68 that he was born about February 1885.

* * * * * * *

It is contended for appellants that article 44 of the Limitation Act, schedule II, does not apply, as the alienations were a nullity and need not be set aside. The conveniences of this way of getting over the difficulty are obvious, but the argument is capable of too great extension and application not to be carefully scrutinized. It is urged that Manjappa was not a legal guardian of plaintiffs 1 and 2 and had no power to alienate that the Minors' Act XX of 1864 was then in force, and that Krishnappa had no power to appoint Manjappa guardian by exhibit 68. It is of course true that Manjappa was not appointed by the Court but the Courts have always I believe recognized *de facto* guardians, who are therefore just as much legal guardians as any others, to the extent of their powers. It may be that Manjappa exceeded his powers and plaintiffs 1 and 2 might have so contended had they sued within the period of limitation, but I cannot agree that his alienations are to be disregarded as nullities.

Plaintiffs preferred a Second Appeal.

Dhurandhar with *N. A. Shiveshvarkar* and *G. P. Murdeshvar* for the appellants (plaintiffs):—The appointment of the guardian was void *ab initio* under the Hindu law. The *mukhtiarnama* was a nullity. A manager of a joint Hindu family cannot appoint a guardian for minor co-parceners by will or deed. It is against the spirit of the Hindu law: Mayne's Hindu law, p. 273; Macnaghten, p. 103; Trevelyan's Hindu law, p. 56; *Budhilal* v. *Morarji*[1] which leans against the validity of such an appointment by will; *Gharib-ul-lah* v. *Khalak Singh*[2]. At Krishnappa's death the crown became the guardian of the minors under Bombay Act XX of 1864. Manjappa being a stranger to the family, had no place as a guardian, as the mothers of the minors were their natural guardians and they alone could act as legal guardians under the impliedly delegated authority. Moreover the *mukhtiarnama* was in the nature of a

(1) (1907) 31 Bom. 413

(2) (1903) L R 30 I. A. 165

will: *Harilal Bapuji* v. *Bai Mani*[1] where the will empowering the trustees to take whole property into their possession till the son attained majority was set aside.

Manjappa was merely a trespasser acting under an invalid deed. An act which is manifestly a nullity need not be set aside. The lower Courts have found as a fact that Manjappa acted as a guardian for several years, but a *de facto* guardian cannot clothe himself with legal powers to sell though he assumes important responsibilities in relation to the minor's property: *Mata Din* v. *Sheikh Ahmad Ali*[2]

Further, plaintiff 1 could not have given a discharge within the meaning of section 7 of the Limitation Act, because that would not have been for the benefit of plaintiff 2. A manager cannot recover a time-barred debt. It is not found that plaintiff 1 was in fact a manager. The point is concluded by the decision of the Allahabad High Court in *Ganga Dayal* v. *Mani Ram*[3] which is on all fours with the present case. See also *Govindram* v. *Tatia*[4], *Mulchand* v. *Kesari*[5].

Lastly, we submit that the case will have to be remanded as there is no finding on the question of necessity or benefit of the family. No act of a guardian would have a binding effect unless necessity for the act is established. There is no presumption of law that the act of a guardian is for the necessity of the family. On the other hand the recorded facts clearly show that the alienation was made for a grossly inadequate consideration. Our suit is dismissed upon a preliminary ground of limitation.

Nadkarni with *S. S Patkar* (Government Pleader) and *V. R Sirur* for the respondents (defendants)—The

(1) (1905) 29 Bom. 351
(2) (1912) 14 Bom. L. R. 192
(3) (1908) 31 All. 156
(4) (1895) 20 Bom. 383
(5) (1910) 12 Bom. L. R. 682

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appointment of the guardian was valid under Hindu law: Colebrooke's Digest, Vol. II, p. 576. See also Katyáyaná's text, "But if a man die, leaving an infant son, his wealth must be provided entire by his kinsmen," to which Jagannath adds, "there is no harm in permitting the estate to be guarded by a kinsman selected by her, for it is only directed that the widow and the rest *shall* guard the property by *any possible means*." Here the means adopted by the widows, who were the natural guardians of the minors, consisted in the confirmation of the appointment of the guardian made by the head of the family. The guardian was in fact their mouth-piece. Their acquiescence in the appointment shows that he was their agent as well: *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[1]. In any event we submit that an adult Hindu may appoint a guardian or even a trustee when all the co-parceners are minors, provided the succession to the co-parcenery property is not disturbed. Otherwise there would be a complete dead-lock. Moreover, the guardian may be appointed by the Court when all the co-parceners are minors: *Bindaji* v. *Mathurabai*[2] wherein *Gharib-ul-lah* v. *Khalak Singh*[3] is distinguished. See also the later case of *Ramchandra* v. *Krishnarao*[4]. If Manjappa had applied to the Court, the Court would have appointed him guardian as the widows, the natural guardians, had acquiesced in the appointment. In that case, the sale by Manjappa would not have been void but voidable under section 30 of the Guardians and Wards Act, 1890. Acts of 1858 and 1864 have no application to the present case. But supposing that they did apply, we submit having regard to *Honapa* v. *Mhalpai*[5] and the current of authorities following it, it is well estab-

(1) (1869) 13 Moo I A. 209.
(2) (1905) 30 Bom 152
(3) (1903) L. R. 30 I. A. 165
(4) (1908) 32 Bom. 259.
(5) (1890) 15 Bom. 259.

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lished that neither Act forbids the natural or *de facto* guardian of a minor, not holding a certificate under the Acts, from disposing of property belonging to a minor. The acts of a *de facto* guardian are not void *ab initio*: *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(1), where it was held that the title of a person who had taken from a *de facto* manager is not affected by the want of union of the *de facto* with *de juri* title. See also *Girraj Bakhsh* v. *Kazi Hamid Ali*(2) and *Mohanund Mondul* v. *Nafur Mondul*(3) following *Ram Chunder Chuckerbutty* v. *Brojonath Mozumdar*(4). In the present case both the Courts have found that Manjappa had exercised various acts of guardianship for ten years. In fact the property in dispute was purchased by Manjappa on behalf of the minors. The minors obtained title to the property by Manjappa's act. Subsequently Manjappa sold the property for consideration. The plaintiffs, therefore, cannot approbate and reprobate. They cannot affirm the purchase by Manjappa and repudiate the sale by him.

A Hindu may appoint a guardian by will: *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh*(5) where it was held that a mother could be excluded from guardianship: sections 6, 7, clause (3) and 39 of the Guardian and Wards Act, 1890; Trevelyan's Hindu Law, p. 207. The ruling in *Budhulal* v. *Morarji*(6) can be distinguished on the ground that the only point decided there was that assuming a Hindu father has power to appoint a guardian by will, he is not, for the purposes of section 440 of the Civil Procedure Code, 1882, an authority competent in that behalf: *Jogesh Chunder Chakravarti* v. *Umatara Debya*(7); *In the matter of*

(1) (1856) 6 Moo I. A. 393 at p. 413
(2) (1886) 9 All 340 at p. 346
(3) (1899) 26 Cal 820
(4) (1879) 4 Cal 929
(5) (1867) 7 W. R. 74
(6) (1907) 31 Bom 413
(7) (1878) 2 C. L. R. 577.

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Srish Chunder Singh[1], which pre-suppose that a testamentary guardian may be appointed by a Hindu.

On the question of limitation we submit that a suit for a declaration that a sale of the plaintiffs' property by his guardian is not binding on him and for possession and mesne profits, is governed by article 44 and not article 144 of the Limitation Act: *Sham Chandra Dafadar* v. *Gadadhar Mandal*[2], *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[3], *Malkarjun* v. *Narhari*[4], *Doraisawmy* v. *Nondisawmy*[5], *Rampal Singh* v. *Balbhaddar Singh*[6], *Ranga Reddi* v. *Narayana Reddi*[7], *Madugula Latchiah* v. *Pally Mukkalinga*[8], *Govindasamy Pillai* v. *Ramasawmy Pillai*[9], *Chanvirapa* v. *Danava*[10], *Hafiz Aminuddin Ahmed* v. *G. L. Garth*[11].

Plaintiff 2 is also barred under section 7 of the Limitation Act. *Ahinsa Bibi* v. *Abdul Kader Saheb*[12], *Periasami* v. *Krishna Ayyan*[13], *Vithu Dhondi* v. *Babaji*[14], *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose*[15], *Ranga Reddi* v. *Narayana Reddi*[7].

In *Ganga Dayal* v. *Mani Ram*[16] the Court had not found as in the present case that the elder brother was the manager of the family. In *Mata Din* v. *Ahmad Ali*[17] there was no *de facto* guardian as such, for one single act, which is itself impeached, cannot constitute a person a *de facto* guardian.

(1) (1893) 21 Cal 206
(2) (1911) 13 Cal. L J 277.
(3) (1899) 23 Mad. 271.
(4) (1900) 25 Bom. 337.
(5) (1911) 21 Mad L J 1041.
(6) (1902) 25 All 1
(7) (1905) 28 Mad 423.
(8) (1907) 30 Mad 393
(9) (1908) 32 Mad 72.
(10) (1894) 19 Bom 593
(11) (1898) 3 Cal W. N. 91.
(12) (1901) 25 Mad 26.
(13) (1902) 25 Mad 431.
(14) (1908) 32 Bom 375.
(15) (1886) 14 Cal 50
(16) (1908) 31 All 156.
(17) (1912) 34 All 213.

SCOTT, C. J.:—The *Mukhtyarnamah* (Exhibit 68) was executed by Krishnappa in order to provide for the management of the estate (including the settlement of money debts and pecuniary claims) both during Krishnappa's life-time and after his death until the attainment of majority by the eldest minor in the family, *i. e.*, the 1st plaintiff. The document was similar in design to the *Hibbahnamah* in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[1] but was dissimilar in that instead of prohibiting the guardian and manager from making gifts or sales it gave Manjappa after Krishnappa's death power to manage as he thought fit.

In a family consisting in other respects of minors and women it is a matter of practical convenience that the dying adult male should be able to make arrangements for guardianship and management, otherwise a deadlock and loss would be arrived at through various widows quarrelling among themselves.

The Privy Council in the case above mentioned have recognized the right of the dying adult to appoint managers and trustees without interfering with the succession. So also in *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh*[2], the Bengal High Court held that a Hindu might by will appoint one widow guardian of all his sons to the exclusion of the natural mother of two of them even though the will should prove invalid so far as it purported to affect the devolution of the property.

If the right of the father to make a binding arrangement is restricted to the interests of his own sons and wives, (for the, cases above cited go no further), yet in the present case the mothers of Krishnappa's undivided nephews acquiesced in the arrangement and they in the absence of any other lawfully appointed guardians were

(1) (1869) 13 Moo I. A. 209 (2) (1866) 7 W. R. 74

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MAHABLESHVAR KRISHNAPPA v. RAMCHANDRA MANGESH.

Srish Chunder Singh[1], which pre-suppose that a testamentary guardian may be appointed by a Hindu.

On the question of limitation we submit that a suit for a declaration that a sale of the plaintiffs' property by his guardian is not binding on him and for possession and mesne profits, is governed by article 44 and not article 144 of the Limitation Act: *Sham Chandra Dafadar* v. *Gadadhar Mandal*[2], *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[3], *Malkarjun* v. *Narhari*[4], *Doraisawmy* v. *Nondisawmy*[5], *Rampal Singh* v. *Balbhaddar Singh*[6], *Ranga Reddi* v. *Narayana Reddi*[7], *Madugula Latchiah* v. *Pally Mukkalinga*[8], *Govindasamy Pillai* v. *Ramasawmy Pillai*[9], *Chanvirapa* v. *Danava*[10], *Hafiz Aminuddin Ahmed* v. *G. L. Garth*[11].

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MAHABLE-SHVAR KRISHNAPPA v. RAMCHANDRA MANGESH.

SCOTT, C. J.:—The *Mukhtyarnamah* (Exhibit 68) was executed by Krishnappa in order to provide for the management of the estate (including the settlement of money debts and pecuniary claims) both during Krishnappa's life-time and after his death until the attainment of majority by the eldest minor in the family, *i. e.*, the 1st plaintiff. The document was similar in design to the *Hibbahnamah* in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*(1) but was dissimilar in that instead of prohibiting the guardian and manager from making gifts or sales it gave Manjappa after Krishnappa's death power to manage as he thought fit.

In a family consisting in other respects of minors and women it is a matter of practical convenience that the dying adult male should be able to make arrangements for guardianship and management, otherwise a deadlock and loss would be arrived at through various widows quarrelling among themselves.

The Privy Council in the case above mentioned have recognized the right of the dying adult to appoint managers and trustees without interfering with the succession. So also in *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh*(2), the Bengal High Court held that a Hindu might by will appoint one widow guardian of all his sons to the exclusion of the natural mother of two of them even though the will should prove invalid so far as it purported to affect the devolution of the property.

If the right of the father to make a binding arrangement is restricted to the interests of his own sons and wives, (for the cases above cited go no further), yet in the present case the mothers of Krishnappa's undivided nephews acquiesced in the arrangement and they in the absence of any other lawfully appointed guardians were

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the guardians of their sons' interests. There is every reason to suppose on the findings of the lower Courts that such acquiescence was in the interests of the minors concerned and the best arrangement that could have been made. Nothing however turns on the question whether Manjappa was the lawfully appointed guardian of Krishnappa's nephews or the agent of such a guardian, for the nephews were all dead before these suits were instituted and their interests devolved by survivorship upon the plaintiffs 1 and 2.

It appears to me that the sale by Manjappa was binding on the plaintiffs 1 and 2 as being within the authority conferred by Exhibit 68. It was certainly not a nullity and none but the plaintiffs 1 and 2 could challenge it. The 1st plaintiff's right, if any, to challenge it was barred at the date of suit under article 44 of the Limitation Act. He could on becoming manager (as he did when 18 years of age) have given a discharge and acquittance to defendants of all claims on them in respect of the leasehold interests if the defendants had chosen to reconvey them and such acquittance would have been binding on his minor co-parcener the plaintiff 2. This plaintiff is therefore barred under section 7 of the Limitation Act.

We affirm the decrees of the lower Courts and dismiss the appeals with costs.

BEAMAN, J.:—I entirely concur.

Decree confirmed

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

SUBRAO MANGESH CHANDAVARKAR (ORIGINAL PLAINTIFF), APPELLANT, v. MAHADEVI KOM MANJIBHATTA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1913. *July 25.*

Civil Procedure Code (Act V of 1908), Order XXXVIII, rule 5—Attachment before judgment—Money decree—Death of judgment-debtor—Property passing by survivorship to his coparcener—Subsequent execution of decree—Right of survivorship not defeated by execution

In 1906 the plaintiff obtained a money decree against B, having first obtained attachment before judgment of certain property which was joint family property. In 1907 B died while joint with defendant 2 The plaintiff applied to execute the decree in 1909 and again in 1911. The lower Courts dismissed the application on the ground that the title of defendant 2 to the property by survivorship was not defeated by the attachment before judgment The plaintiff having appealed —

Held, that the attachment before judgment did not defeat the right of defendant 2 by survivorship; and that the plaintiff had taken no measure to which could be attributed the effect of defeating that right

SECOND appeal from the decision of C. V. Vernon, District Judge of Kanara, confirming the decree passed by V. V. Bapat, Second Class Subordinate Judge at Honavar.

Execution proceedings.

The plaintiff obtained on the 1st November 1906 a money decree against Bellabhatta, having first obtained on the 28th October 1906, an attachment before judgment of property belonging to the joint family of which Bellabhatta was a member. In 1907 Bellabhatta died. The plaintiff applied to execute the decree by sale of the property in 1909 and again in 1911. Subraya (defendant 2), a coparcener of Bellabhatta, opposed the application contending that the property had passed to him by survivorship on Bellabhatta's death.

* Second Appeal No. 808 of 1912

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Both lower Courts dismissed the application on the ground that the attachment before judgment was of no avail against the passing of the property by survivorship.

The plaintiff appealed to the High Court.

S. S. Patkar, Government Pleader, for the appellant.

K. H. Kelkar, for respondent 2 (defendant 2).

BATCHELOR, J.:—This is an appeal in execution proceedings, and it arises upon these facts.

The appellant on 1st November 1906 obtained a money decree against one Bellabhatta. Prior to the decree, *i. e.*, on 23rd October 1906, the appellant had obtained attachment before judgment of the property in suit, as being the property of Bellabhatta. Some time in 1907 Bellabhatta died. Admittedly he was in union with the respondent 2, and the property was joint family property, which on Bellabhatta's death would ordinarily have passed to respondent 2 by survivorship. Nothing further was done under the decree till 1909 and 1911, when the appellant made applications for execution.

The question is whether, in these circumstances, the respondent's title by survivorship was defeated by the appellant's attachment before judgment. Both the lower Courts have answered this question in the negative. In our opinion that is the correct answer.

It would seem that there is no reported decision which precisely covers the present facts, but the nearest discoverable authority is the judgment of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh*[(1)]. Both sides have accordingly relied upon this case, and the determination of the present appeal turns mainly on the correct construction of the Privy Council's judgment. Now in *Suraj Bunsi Koer's case* there had been

(1) (1879) 5 Cal. 148.

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not a mere attachment before judgment, but an attachment in execution and an order for sale; indeed the sale itself would have taken place but for the judgment-debtor's applications for postponement. It was upon these facts that the judgment proceeded, their Lordships saying that "the execution proceedings, under which the mouza had been attached and ordered to be sold, had gone so far as to constitute, in favour of the judgment-creditor, a valid charge upon the land" which could not be defeated by the debtor's death before the actual sale. It would appear, therefore, that the ground of the judgment was that in that case the judgment-creditor had carried execution proceedings so far as to give himself a valid charge upon the property; and this interpretation has the authority of Sir John Edge, C. J., in *Jagannath Prasad* v. *Sita Ram*(1). If this view is right, then we think that the Privy Council's judgment is authority against the present appellant. For, prior to Bellabhatta's death, the appellant had not only not carried execution proceedings to a point where a charge might be held to have been created, but had in fact instituted no execution proceedings at all. All that he had done was to obtain an attachment before judgment, a mere precautionary measure which admittedly creates no charge. Indeed in *Moti Lal* v. *Karrabuldin*(2), Lord Hobhouse, in speaking even of an attachment in execution, says that it "only prevents alienation, it does not confer title."

It follows from the above considerations that the appellant has taken no measure to which could be attributed the effect of defeating the respondent's right by survivorship. And on principle we cannot see any ground upon which the appellant could succeed, for when the right by survivorship accrued to the respondent, there was not in existence any competing right or

(1) (1888) 11 All 302 (2) (1897) 25 Cal 179

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title at all; in other words, there was nothing to arrest the accrual of the respondent's right. This conclusion is supported by the decision of the Madras High Court in *Ramanayya* v. *Rangappayya*[1], where the right of the survivor was held to prevail despite an attachment before judgment. It is true that in that case the defendant had died before the decree was passed, but that circumstance does not, we think, make any difference of substance; for in this case owing to the absence of execution proceedings, as in that case owing to the death of the judgment-debtor before decree, the attachment before judgment did not become effective to render the property available for sale until after the right of survivorship had accrued. For the attachment before judgment, though it enured for the benefit of the creditor, did not avail to render the property saleable until the first application for execution was made in 1909, that is, long after Bellabhatta's death: see *Pallonji Shapurji Mistry* v. *Edward Vaughan Jordan*[2].

This view as to the rights of the present parties has also the support of the high authority of Westropp, C. J., in *Udaram Sitaram* v. *Ranu Panduji and Venku Panduji*[3], where the Chief Justice noticed the case of *Goor Pershad* v. *Sheodeen*[4]. With the observations as to the alienability of a coparcener's share in this Presidency we have no concern, but the judgment shows that the Chief Justice and West, J., "fully concurred" in the decision in *Goor Pershad's case* so far as that decision held that where the coparcener's share had been attached, and attached in execution proceedings, and the coparcener had died before the actual sale, the judgment-debtor at his death had left no right at all in the property, and there was consequently nothing in

(1) (1893) 17 Mad. 144.
(2) (1888) 12 Bom. 400.
(3) (1875) 11 Bom. H. C. R. 76.
(4) (1872) 4 N.-W.-P. H. C. R. 137.

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connexion with it which was liable to be sold. It is true that though the execution proceedings in *Goor Pershad's case* were not carried so far as in *Suraj Bunsi Koer's case*, yet the former decision must be taken to have been overruled by the Judicial Committee at least to this extent that it can no longer be held that the right by survivorship is to be defeated only by an actual sale during the judgment-debtor's life-time. That, however, leaves matters only at this point, that the right by survivorship is defeated in a case where, a parcener's interest having been attached in his life-time under a decree obtained against him for his separate bond debt, and a sale having subsequently been held under the attachment, the judgment-debtor dies between the date of the attachment in execution and the sale. Here the facts are much stronger in favour of the surviving coparcener, since, as we have noticed, no proceedings in execution had been taken by the creditor at the time of the coparcener's death, nor was any sale ever held, but the solitary circumstance on which the creditor can rely is the attachment before judgment. We are brought back, therefore, to the question whether such an attachment can be held to be operative to defeat the survivor's right for, in *Suraj Bansi Koer's case*[1] their Lordships say "It seems to be clear upon the authorities that if the debt had been a mere bond-debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it in the father's life-time, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands". On the facts of this suit we are of opinion, for the reasons stated, that this is such a case, and that no sufficient proceedings have been taken by

(1) (1879) 5 Cal 148 at p 173

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the creditor to enforce his claim during the debtor's life-time.

Mr. Patkar has contended, on the authority respectively of *Ganu Singh* v. *Jangi Lal*[1], and of *B. Krishna Rau* v. *Lakshmana Shanbhogue*[2], first, that an attachment before judgment stands for all purposes on the same footing as an attachment in execution, and, secondly, that an attachment in execution creates a valid charge and is sufficient to defeat the right by survivorship. This latter proposition, however, which is otherwise doubtful, no longer has the support of the Madras High Court: see *Sankaralinga Reddi* v. *Kandasami Tevan*[3], and *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, &c., Devastanams*[4]. And the former proposition is equally devoid of authority; for all that the learned Judges decided in *Ganu Singh's case* was that an attachment before judgment and an attachment after judgment had the same effect for one particular purpose, namely binding the property so as to prevent private alienations. Here there is no question of any private alienation, and the appellant's contention must consequently be disallowed.

For these reasons we are of opinion that the lower Court's decree is right, and we dismiss this appeal with costs.

Appeal dismissed.

R. R.

(1) (1899) 26 Cal 531 at p 534
(2) (1881) 4 Mad 302
(3) (1907) 30 Mad 413.
(4) (1909) 32 Mad 429.

CRIMINAL APPELLATE.

Before Mr Justice Batchelor and Mr. Justice Shah.

EMPEROR *v.* HARIDAS LAKHMIDAS* 1913 *July* 31.

Coasting-Vessels Act (XIX of 1838), sections 4. 7 and 13†—Registry of vessels—Certificate of registry—Certificate issued in the name of a person who trades in his own name jointly with his son—The son continuing the business in the same name after the person's death—Fresh certificate not obtained—Liability of the son for plying the craft without certificate

A person owning a craft had taken out a certificate of registry in his own name under section 7 of the Coasting-Vessels Act (XIX of 1838) He traded

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* Criminal Appeal No 204 of 1913.

† The material portions of these sections run as follows —

4 The name and number of every such vessel employed as aforesaid, fishing vessel and harbour-craft, and her burthen, and also the name or names of the owner or owners thereof, shall be registered in a book to be kept for that purpose by the person hereinafter directed to make such registry.

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, . and whenever any change shall take place . in the name or names of the owner or owners thereof, such registry shall be made again.

° ° ° ° ° ° °

7. The owner or owners of any such vessel employed as aforesaid, fishing-vessel and harbour-craft shall apply for and obtain a certificate of registry from the person authorized to make such registry as aforesaid, and such certificate shall be in the form specified in the schedule' appended to this Act . . .

13. . . . in case any such vessel employed as aforesaid, fishing-vessel or harbour-craft shall not be furnished with such certificate as hereinbefore specified, or in case the owner or owners or commander of any such vessel employed as aforesaid, fishing-vessel or harbour-craft shall not produce such certificate on demand thereof as hereinbefore directed,

the owner or owners of every such vessel employed as aforesaid shall be subject to a fine of ten times the amount of the fees payable in respect of the certificate of registry of such vessel, the same being a vessel for the certificate of the registration of which any fee is payable ; and the owner or owners of any such fishing-vessel or harbour-craft shall be subject to a fine of ten rupees

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in his own name jointly with his sons. On his death, his son carried on the business as before under the same name and did not take out a fresh certificate for the craft. The son was prosecuted under section 13 of the Act for plying the craft without a certificate, but was acquitted by the Magistrate. The Government having appealed :—

Held, that the craft having been registered in the father's name, and the ownership of it having passed on his death to his son, the latter was bound to obtain a fresh certificate in his own name under section 4 of the Coasting-Vessels Act (XIX of 1838); and that his failure to do so was punishable under section 13 of the Act.

THIS was an appeal by the Government of Bombay from an order of acquittal passed by Manilal Ajitrai, First Class Magistrate of Thana.

The father of the accused, Lakhmidas, owned a craft which he plied for hire. The craft was registered as required by the Coasting-Vessels Act (XIX of 1838) and the certificate of registry was issued in the name of Lakhmidas. He traded jointly with his son and carried on the family business in his own name. On Lakhmidas' death, his son Haridas continued the business in the same name as before. He did not obtain a fresh certificate for the craft.

For this omission, the accused was prosecuted under section 13 of the Coasting-Vessels Act (XIX of 1838) for plying the craft without a certificate. The trying Magistrate acquitted him on the ground that no fresh certificate was necessary for the son continued the business in the name of his father, and there was consequently no change in the name of the owner of the craft.

The Government of Bombay appealed against the order of acquittal.

S. S. Patkar, Government Pleader, for the Crown.

K. H. Kelkar, for the accused.

BATCHELOR, J.:—This is an appeal by the Government of Bombay against the acquittal of one Haridas Lakh-

midas who was accused of having committed an offence punishable under section 13 of the Coasting-Vessels Act (XIX of 1838) in that, being the owner of a harbour-craft he plied the craft for hire without getting the certificate of registry required by sections 4 and 7 of the Act.

It appears that Haridas Lakhmidas, the accused, and his brother and father were members of a joint Hindu family, and the craft was registered in the name of the father Lakhmidas Kurji, who died in June 1912. Under section 4 of the Act a second registration is required whenever any change takes place in the name of the owner of any harbour-craft. The learned Magistrate, however, who tried the accused, acquitted him on the ground that in this case the necessity for a second registration was avoided inasmuch as the business now conducted by the son, the accused, retained the name of the father Lakhmidas Kurji. Mr. Kelkar, who has endeavoured to support the learned Magistrate's judgment, has put it upon the ground that the real owners of this craft, when it was registered in the name of the father, were the father and the two brothers and that the father's death does not constitute a change in the ownership of the craft. It appears to us, however, that the words of the Act are too clear to admit of any such construction as this. Sections 4 and 7 of the Act and the Schedule appended to it seem to us to show that the Act requires the certification of a certain individual or individuals as being the owner or owners of the harbour-craft. In this case, admittedly, the craft was registered in the name of the father Lakhmidas. According to the Schedule, therefore, it was certified that Lakhmidas was the sole owner of this craft. When Lakhmidas died in June 1912, he was no longer the sole owner of the craft, and it follows that there was a change in the ownership of the craft which, previously owned by Lakhmidas was now owned by the present accused.

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EMPEROR v. HARIDAS LAKHMIDAS.

That being so, it was, in our opinion, incumbent upon the accused under section 4 of the Act to take out another registration. Since he did not do so, he is liable to the penalty prescribed by section 13 as the punishment for an owner of a harbour-craft who is guilty of this omission. The result is that under that section the accused, who must be convicted of the offence imputed to him, is subject to a fine of Rs. 10, and following the decision in *Empress* v. *Mhasnya Rama*[1] we direct that he pay this fine of Rs. 10.

R. R.

[1] (1883) 7 Bom 280.

CRIMINAL REFERENCE.

Before Mr. Justice Heaton and Mr Justice Shah.

1913. *August 28.*

EMPEROR *v* NANJI SAMAL.*

Criminal Procedure Code (Act V of 1898), section 213—Committal of a case to the Court of Session—Reasons for committal to be given where the case can be tried by the Magistrate—Indian Registration Act (XVI of 1908), section 83, clause (2)—Irregularity—Illegality.

Where a Magistrate, who could have tried the case himself under clause (2) of section 83 of the Indian Registration Act (XVI of 1908), committed it to the Court of Session without giving any reasons for committal.—

Held, that the reasons for committal must include not merely reasons for not discharging the accused, but reasons for sending him to the Court of Session, as the trial could be had either by the Magistrate himself or by the Court of Session; and that the omission to give the reasons was an illegality.

THIS was a reference made by E. Clements, Sessions Judge of Ahmedabad.

The accused was charged before the City Magistrate of Ahmedabad with an offence punishable under section 82A of the Indian Registration Act (XVI of 1908). The Magistrate, however, instead of trying the case himself

* Criminal Reference No. 61 of 1913.

as he was competent to do under section 83 (2) of the Act, committed the case to the Court of Session without giving any reasons.

The Sessions Judge referred the case to the High Court for quashing the commitment, on the ground that the Magistrate had given no reasons for committing the case which was triable by himself.

The reference was heard.

G. N. Thakore, for the accused.

No appearance for the Crown.

HEATON, J. :—In this case the Magistrate, as appears quite plainly from clause (2) of section 83 of the Registration Act, could have tried the case himself but he committed it to the Court of Session. He did not however give any reason why he should commit it rather than try it himself. The law requires that reasons for commitment shall be recorded (see section 213 of the Criminal Procedure Code). In a case of this kind where the trial may either be by the Magistrate himself or by the Court of Session, I think that reasons for commitment must include not merely reasons for not discharging the accused, but reasons for sending him before the Court of Session. There has, therefore, been a failure to comply with the law. This no doubt would amount to no more than an irregularity if the case were one which plainly ought to be committed to the Sessions. But where, as appears here, the case is not one which ought to have been committed, then to commit without giving reasons is more than an irregularity. It is, it seems to me, an illegality.

For this reason I would quash the commitment and it follows the case will have to be disposed of by the Magistrate who committed it.

Commitment quashed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1913. *September 3*

THE DHOLKA TOWN MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT, *v.* PATEL DESAIBHAI KALIDAS AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Irrigation Act (Bom. Act VII of 1879)—District Municipal Act (Bom. Act III of 1901), section 56—Drainage cut—Drainage channel—Neglect of proper repairs by local bodies—Flow of water across the road into plaintiffs' field—Damage—Liability of local bodies—Non-feasance—Neglect of highways.

Where drainage water passing along a certain drainage cut owing to some default instead of flowing along the assigned channel flowed across the road into the plaintiffs' field and caused damage to the plaintiffs and the damage was found to be due, not to the authorized drainage work but to the neglect of the drainage channel which the Municipality was bound to repair,

Held, that the Municipality was liable to the plaintiffs in damages.

Per Curiam.—The exemption from liability of local bodies on the ground of non-feasance is confined to neglect of highways and does not apply to drainage works carried out by the local bodies for their convenience, which they are bound to maintain in a proper state of repairs so that they shall not be a nuisance to the neighbouring owners.

Borough of Bathurst v. *Macpherson*[1], *Municipality of Picton* v. *Geldert*[2], referred to.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, reversing the decree of Parvatishankar M. Bhat, Subordinate Judge of Dholka.

The plaintiffs sued to recover Rs. 385 from the defendant Municipality alleging *inter alia* that the defendant Municipality constructed the western drainage channel as a sanitary measure for the improvement of the health of the town of Dholka in the year 1900, that the defendant Municipality did not keep the said channel in proper order and hence there was no proper discharge

* Second Appeal No. 455 of 1912.

(1) (1879) 4 App. Cas. 256.

(2) [1893] A. C. 524.

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of rain water, that their crops were thereby damaged and they suffered loss every year, that the Municipality was served with a notice to keep the channel in good order but they failed to do so and hence the cause of action which was alleged to have accrued on the 26th August 1908. The plaintiffs further prayed that the defendant Municipality be enjoined to keep the channel in good order so that its water may not run into plaintiffs' land.

The defendant Municipality contended that the channel was a sanitary measure and it did not do any wrong to the plaintiffs' fields, that the plaintiffs should have moved the Government and not the Municipality in the matter, that the suit was time-barred, that the defendant Municipality did make repairs in 1907, though it was not the duty of the Municipality to do so, that the plaintiffs had no fields in the immediate vicinity of the channel, and that there was no neglect on the part of the Municipality.

The Subordinate Judge found that his Court had jurisdiction to entertain the suit, that no loss or damage was done to plaintiffs' crops by any wrongful or negligent act or omission on the part of the defendant Municipality and that nothing was due to plaintiffs on account of damages. He, therefore, dismissed the suit

On appeal by the plaintiffs the District Judge found that the discharge of rain water on to the plaintiffs' land came about through the neglect of the defendant Municipality and it did cause damage to plaintiffs and that they were entitled to damages His reasons were as

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1913. *September 3*

THE DHOLKA TOWN MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT, *v.* PATEL DESAIBHAI KALIDAS AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Irrigation Act (Bom. Act VII of 1879)—District Municipal Act (Bom. Act III of 1901), section 56—Drainage cut—Drainage channel—Neglect of proper repairs by local bodies—Flow of water across the road into plaintiffs' field—Damage—Liability of local bodies—Non-feasance—Neglect of highways.

Where drainage water passing along a certain drainage cut owing to some default instead of flowing along the assigned channel flowed across the road into the plaintiffs' field and caused damage to the plaintiffs and the damage was found to be due, not to the authorized drainage work but to the neglect of the drainage channel which the Municipality was bound to repair,

Held, that the Municipality was liable to the plaintiffs in damages.

Per Curiam.—The exemption from liability of local bodies on the ground of non-feasance is confined to neglect of highways and does not apply to drainage works carried out by the local bodies for their convenience, which they are bound to maintain in a proper state of repairs so that they shall not be a nuisance to the neighbouring owners.

Borough of Bathurst v. *Macpherson*[1], *Municipality of Picton* v. *Geldert*[2], referred to.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, reversing the decree of Parvatishankar M. Bhat, Subordinate Judge of Dholka.

The plaintiffs sued to recover Rs. 385 from the defendant Municipality alleging *inter alia* that the defendant Municipality constructed the western drainage channel as a sanitary measure for the improvement of the health of the town of Dholka in the year 1900, that the defendant Municipality did not keep the said channel in proper order and hence there was no proper discharge

* Second Appeal No. 455 of 1912.

(1) (1879) 4 App. Cas. 256.

(2) [1893] A. C. 524.

of rain water, that their crops were thereby damaged and they suffered loss every year, that the Municipality was served with a notice to keep the channel in good order but they failed to do so and hence the cause of action which was alleged to have accrued on the 26th August 1908. The plaintiffs further prayed that the defendant Municipality be enjoined to keep the channel in good order so that its water may not run into plaintiffs' land.

The defendant Municipality contended that the channel was a sanitary measure and it did not do any wrong to the plaintiffs' fields, that the plaintiffs should have moved the Government and not the Municipality in the matter, that the suit was time-barred, that the defendant Municipality did make repairs in 1907, though it was not the duty of the Municipality to do so, that the plaintiffs had no fields in the immediate vicinity of the channel, and that there was no neglect on the part of the Municipality.

The Subordinate Judge found that his Court had jurisdiction to entertain the suit, that no loss or damage was done to plaintiffs' crops by any wrongful or negligent act or omission on the part of the defendant Municipality and that nothing was due to plaintiffs on account of damages. He, therefore, dismissed the suit

On appeal by the plaintiffs the District Judge found that the discharge of rain water on to the plaintiffs' land came about through the neglect of the defendant Municipality and it did cause damage to plaintiffs and that they were entitled to damages. His reasons were as follows.—

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Municipal limits. * * * Now the Municipality have a perfect right to drain Dholka, and if the flooding of the plaintiffs' fields was necessary to this end, it would appear that the plaintiffs would have had no cause of complaint, but it is admitted that the breach in the bank is due to the failure of the people responsible to remove bushes and silt. The consequence is that the channel is much silted at this turn and the banks are no longer able to retain flood water, which accordingly has flowed over the banks and breached them. It appears that the drainage water instead of turning west and flowing along the assigned channel now flows on north across the road and plaintiffs' field. The damage then done to the plaintiffs' field is not due to the drainage but to the neglect of the channel, and it is perfectly clear that the Municipality is bound to repair the channel. Government had nothing to do with the cut except to build it for the Municipality. It is noted that the rainfall on the particular occasion of which the plaintiffs complain was not excessive or abnormal, but really trivial. I find then that the discharge of rain water on to the plaintiffs' land came about through the neglect of the defendant Municipality and it did cause damage to plaintiffs.

The District Judge, therefore, remanded the case to the first Court for a finding as to the amount of damages caused to the plaintiffs; and that Court found that Rs 132-12-0 were due to plaintiffs for damages.

Against the said finding both the parties appealed. The plaintiffs in their appeal urged that the amount of Rs. 132-12-0 was too low and the defendant Municipality objected that the amount was too high. The Judge reversed the finding and decree of the lower Court and directed the plaintiffs to recover Rs. 110 from the defendant Municipality with costs in proportion.

The defendant Municipality preferred a second appeal.

G. S. Rao, for the appellant (defendant Municipality).

N. K. Mehta, for the respondents (plaintiffs).

The following cases were cited in arguments :—

Municipality of Pictou v. *Geldert*[1], *Cowley* v. *Newmarket Local Board*[2], *Gibson* v. *Mayor of Preston*[3], *Achratlal* v. *The Ahmedabad Municipality*[4].

(1) [1893] A. C. 524.
(2) [1892] A. C. 345.
(3) (1870) L. R. 5 Q. B. 218.
(4) (1904) 28 Bom. 340.

Borough of Bathurst v. *Macpherson*[1], *Sanitary Commissioners of Gibraltar* v. *Orfila*[2].

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SCOTT, C. J. :—Upon the findings of fact of the lower appellate Court we are of opinion that the decision appealed from is right. The drainage water passing along a certain drainage cut owing to some default instead of flowing along the assigned channel flows across the road into the plaintiff's field and causes damage to the plaintiff. The damage is found to be due, not to the authorised drainage work, but to the neglect of the drainage channel, which the Municipality is bound to repair. The Government made the cut under their powers under the Irrigation Act, but it was built merely for the convenience of the Municipality, who took it over, and who are authorised under section 56 of the District Municipal Act to expend money on works outside the Municipal district. It is contended on behalf of the appellant that the Municipality are under no liability in respect of the damage caused to the plaintiff, because it is a matter arising from non-feasance and not from mis-feasance. But the exemption from liability of local bodies on the ground of non-feasance is confined to neglect of highways, and does not apply to drainage works carried out by the local bodies for their convenience, which they are bound to maintain in a proper state of repairs so that they shall not be a nuisance to the neighbouring owners. This appears from the judgments of the Privy Council in *Borough of Bathurst* v. *Macpherson*[1] and *Municipality of Picton* v. *Geldert*[3]. We, therefore, affirm the decree of the lower appellate Court and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

[1] (1879) 4 App Cas 256. [2] (1890) 15 App. Cas. 400.

[3] [1893] A. C. 524 at p. 531.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1913
March 14, 27.

JANKIBAI, WIDOW (PLAINTIFF) *v.* SHRINIVAS GANESH VALSHANKAR AND OTHERS (DEFENDANTS) °

Civil Procedure Code (Act V of 1908), Order II, Rule 5—Misjoinder of causes of action—Hindu family, position of surviving members of joint and undivided, not heirs of deceased member—Joinder of claim by widow of deceased member of joint and undivided Hindu family for maintenance against the property in which the deceased member was a co-parcener at the date of his death with claims against the surviving co-parceners for her stridhan *ornaments.*

Members of a joint and undivided Hindu family hold the family estate jointly and are seized of it "*per my et per tout*" On the death of a co-parcener of a joint Hindu family his share and interest in the family property is automatically absorbed and the surviving co-parceners become the full owners of the whole estate. Such co-parceners are not the heirs of the deceased but inherit by survivorship and become the owners of the interest of the deceased in the family estate as co-owners in their own right and by the legal extinction of the interest of the deceased co-parcener by reason of his death. The claim of the widow of such a deceased co-parcener for maintenance is clearly not against "the estate of the deceased" husband but is against the property of which he was a co-parcener at the time of his death Accordingly there is no misjoinder of causes of action if the widow in one suit sues the co-parceners of her deceased husband to recover her *stridhan* property improperly or illegally detained by them and also to enforce her right of maintenance out of the estate of the joint family of which during his life-time her husband was a member.

THE facts of this case are set forth in sufficient detail in the judgment of the learned Judge.

Pradhan, with *Kirtikar*, for the plaintiff.

Bhandarkar, with him *Mirza*, for the defendants.

DAVAR, J.:—The plaintiff Jankibai is the widow of Vithal Valsankar, who died in 1907. He left him surviving his widow, the plaintiff herein, and his five brothers who are all defendants in this suit. The six brothers were members of a joint and undivided Hindu

° Suit No. 313 of 1910.

family and it is admitted that they were owners of joint ancestral properties, consisting of houses and lands, which are in Akalkote in the Sholapur District. These properties are now in the possession of the defendants.

The plaintiff has filed this suit to recover from the defendants her *stridhan* ornaments which, she says, she left with her husband's brothers when she left their house, and she claims maintenance and arrears of maintenance out of the joint ancestral property now in the possession of the defendants. These claims are resisted on various grounds which for the present purposes it is unnecessary to set out.

The defendants contend that this suit as framed is bad for misjoinder of causes of action.

The first issue raised by the learned counsel for the defendants is :—

"Whether the suit is not bad for misjoinder of causes of action."

It was argued in support of the contention that the claim for ornaments is against the defendants personally and could not be joined with the claim for maintenance which is against the defendants as the heirs of the plaintiff's husband, and reliance was placed on the provisions of Order II, Rule 5, of the Civil Procedure Code.

At the hearing, it was agreed that the issue as to misjoinder should be tried in the first instance.

Order II, Rule 5, re-enacts Rule (*b*) of section 44 of the old Civil Procedure Code. It says that no claim by or against an executor, administrator or heir as such shall be joined with claims by or against him personally. Although this question has repeatedly arisen, there is no reported case except one where it was specifically raised and decided. In *Gokibai* v *Lakhmidas Khimji*[1],

[1] (1890) 14 Bom 490.

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wherein a Hindu widow sued her father-in-law for maintenance, this question was raised before the late Mr. Justice Scott and he held that the suit was bad by reason of misjoinder of causes of action and the plaintiff was put upon her election to proceed upon one or the other of the two claims made by her in the suit. Though the case itself is of some importance on the other questions arising in the suit, the report is exceedingly meagre on this particular point. As I am not prepared to follow the conclusion arrived at by the learned Judge in that case, I think it is desirable to set out here all that the report says on the subject. It says (p. 492):—

"On behalf of the defendant an issue was raised as to whether the plaintiff had not improperly joined her claim for maintenance and her claim for ornaments and clothes in this suit and was not bound to elect which claim she would prosecute The learned Judge held that under section 44 of the Civil Procedure Code (Act XIV of 1882) there was a misjoinder of causes of action, the claim for maintenance being against the estate of the deceased, and the claim for ornaments and clothes being against the defendant personally"

Unfortunately it does not appear from the report what arguments were addressed to the Court, nor is there any judgment setting out the reasons for the decision beyond what is stated by the Reporter in the extract I have quoted above. It seems to me that the conclusion of the Court in the case in question is based on the fallacies involved in the assumption that there was, at the time the widow made the claim, any estate which can be rightly called the estate of her deceased husband, and also in the assumption that the surviving co-parceners of a joint and undivided Hindu family can be properly called the heirs of a deceased co-parcener. Members of a joint and undivided Hindu family hold family estate jointly and are seized of it "*per my et per tout.*" The joint tenants have each of them the entire possession as well of every parcel as of the whole.

On the death of a co-parcener of a joint Hindu family his share and interest in the family property is automatically absorbed and the surviving co-parceners become the full owners of the whole estate. Such co-parceners are not the heirs of the deceased. They inherit by survivorship. They become the owners of the interest of the deceased in the family estate not as heirs of the deceased but as co-owners in their own right and merely by the legal extinction of the interest of the deceased co-parcener by reason of his death. The widow's claim for maintenance is clearly not against "the estate of the deceased" husband but is against the property in which he was a co-parcener at the time of his death. When a husband who is a member of a joint Hindu family possessing only joint ancestral property dies, he leaves no estate and the co-parceners do not inherit any estate as his heirs.

In this case the defendants are not in any sense the heirs of the plaintiff's husband. The plaintiff's husband has left no estate. The plaintiff's claim for maintenance is not against her husband's estate nor is it against the defendants as the heirs of her husband *as such*.

As I have observed above, the identical question I am now discussing has frequently arisen in our Court and *Gokibai's case*[1] has always been cited and discussed but the results have been in most of these cases unsatisfactory and inconclusive. Some Judges have followed the ruling of Scott, J., but in many instances the Judges have refused to follow it either dissenting from it or distinguishing the case before them from this particular case. After much anxious consideration, I have come to the conclusion that there is no misjoinder of causes of action if a Hindu widow sues in one suit the co-parceners of her deceased husband to recover her

(1) (1890) 14 Bom 490

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stridhan property improperly or illegally detained by them and also to enforce her right of maintenance out of the estate of the joint family of which during his life-time her husband was a member.

It has not been argued before me that the suit is bad for misjoinder of causes of action on any ground other than the prohibition enacted in Order II, Rule 5. Order I, Rule 3, provides for joinder of parties and Order II, Rule 3, provides for joinder of causes of action and both these questions have been fully considered and discussed by me in my previous judgments in *Mowji Monji* v. *Kuverji Nanaji*[1] and in *Umabai* v. *Bhau Balwant*[2].

I find the first issue in the negative and hold that the suit as framed is not bad by reason of misjoinder of causes of action.

The suit will be put down on board for further hearing subject to a part heard suit. I will deal with the question of costs of the trial of this issue when I deal with the costs of the suit.

Attorneys for the plaintiff: *Messrs. Nanu, Hormusji & Co.*

Attorneys for the defendants: *Messrs. Sabnis and Goregaonkar.*

H. S. C.

[1] (1907) 31 Bom. 516 [2] (1908) 34 Bom. 358

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District of Kensington in the County of London before the Registrar and Deputy Superintendent Registrar of Marriages of the said district.

After the marriage they lived together at the Albany Hotel and at the Grosvenor Hotel in London until early in October 1911, when they sailed for India reaching Bombay *viâ* Colombo and Madras. On arriving at Bombay the petitioner and the respondent stayed at the Majestic Hotel and afterwards at the Taj Mahal Hotel at both which hotels the petitioner was unwell and they also visited Poona where they stayed at a house of the respondent's father, a brother of the respondent, Cursetji by name, being also present, after which the petitioner and respondent returned to the Majestic Hotel at Bombay. During their stay in Bombay it became clear to the petitioner that the marriage of the respondent to the petitioner was the cause of serious disagreement between the respondent and his family and whether for this or other reasons some coldness seems to have arisen between the petitioner and the respondent. Eventually the petitioner and the respondent, together with the respondent's brother Cursetji, returned to England and arrived at Victoria Station on the evening of the 19th of February 1912, and while at Victoria Station the petitioner and respondent became separated under circumstances as to which contradictory versions were given in the pleadings and never lived together again.

Correspondence then ensued between the parties which however failed to effect a reconciliation and finally the petitioner, in the apparent belief that the respondent would shortly be returning to Bombay, herself came to Bombay, where she landed on the 10th of May 1912, her intention being to renew her request that she should rejoin the respondent, or failing in this to institute such proceedings as she might be advised.

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Held, further, that as regards the jurisdiction confirmed to the Bombay High Court by section 4 of the Indian Divorce Act (which included jurisdiction to entertain suits for the restitution of conjugal rights) the powers of the Bombay High Court were still limited to Christian subjects within the Presidency so that the High Court had no jurisdiction to grant a decree of restitution either against a Parsi respondent or against any respondent not within the Presidency.

Held, further, that following the principles on which the Courts for Divorce and Matrimonial Causes in England have acted and given relief, which principles are made applicable in India under section 7 of the Indian Divorce Act, the Bombay High Court could not give relief by way of restitution of conjugal rights if the respondent named in the petition were absent from the jurisdiction at the time the suit was instituted and remained *absent*, although residence at the date of the suit of both spouses, whatever their domicil might be, would be sufficient to give jurisdiction in suits of this nature.

Firebrace v. *Firebrace*(1), *Chichester* v. *Chichester*(2) and *Armytage* v. *Armytage*(3), followed.

Semble, in the case of matrimonial offences including those other than adultery the application of the Civil Procedure Code, section 20 (corresponding to section 17 of Act XIV of 1882) under section 45 of the Indian Divorce Act involves the necessity of either residence on the part of the defendant or the accrual of the cause of action within the jurisdiction in order to enable the Court to entertain the suit.

Thornton v. *Thornton*(4), referred to.

Semble, also, that mere residence in India at the time of the institution of a suit is not residence within the meaning of section 2 of the Indian Divorce Act and that the residence of the petitioner should be *bonâ fide* and not casual or as a traveller.

Held, however, that monies deposited by a husband respondent as security for his wife's costs of a petition constituted a fund paid in for the benefit of her attorney who was entitled to have it applied for his benefit whatever the result of the petition, provided that he had been in no way to blame and that that rule applied to monies deposited by a respondent appealing from the decision of the lower Court as security for the costs of the appeal in accordance with the Rules of the Bombay High Court.

ON the 4th of August 1911 the respondent, a Parsi, married the petitioner, who professed the Christian religion, by license at the Marriage Register Office in the

(1) (1878) 4 P. D. 63.
(2) (1885) 10 P. D. 186.
(3) [1898] P. 178.
(4) (1886) 10 Bom. 422.

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District of Kensington in the County of London before the Registrar and Deputy Superintendent Registrar of Marriages of the said district.

After the marriage they lived together at the Albany Hotel and at the Grosvenor Hotel in London until early in October 1911, when they sailed for India reaching Bombay *viâ* Colombo and Madras. On arriving at Bombay the petitioner and the respondent stayed at the Majestic Hotel and afterwards at the Taj Mahal Hotel at both which hotels the petitioner was unwell and they also visited Poona where they stayed at a house of the respondent's father, a brother of the respondent, Cursetji by name, being also present, after which the petitioner and respondent returned to the Majestic Hotel at Bombay. During their stay in Bombay it became clear to the petitioner that the marriage of the respondent to the petitioner was the cause of serious disagreement between the respondent and his family and whether for this or other reasons some coldness seems to have arisen between the petitioner and the respondent. Eventually the petitioner and the respondent, together with the respondent's brother Cursetji, returned to England and arrived at Victoria Station on the evening of the 19th of February 1912, and while at Victoria Station the petitioner and respondent became separated under circumstances as to which contradictory versions were given in the pleadings and never lived together again.

Correspondence then ensued between the parties which however failed to effect a reconciliation and finally the petitioner, in the apparent belief that the respondent would shortly be returning to Bombay, herself came to Bombay, where she landed on the 10th of May 1912, her intention being to renew her request that she should rejoin the respondent, or failing in this to institute such proceedings as she might be advised.

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After her arrival in Bombay the petitioner filed a petition in the High Court at Bombay in which she accused the respondent *inter alia* of having deserted her at Victoria Station and prayed that it should be decreed that the respondent should take the petitioner home and receive her as his wife and render her conjugal rights and that he should be ordered to pay to the petitioner such alimony pending suit as might be deemed just. The respondent filed a written statement to the petition in which he accused the petitioner of cruelty and other offences and denied that he had deserted her at Victoria Station. The respondent however admitted that by the 23rd of February 1912, he had finally made up his mind that he could not live with the petitioner. The respondent further submitted that the Bombay High Court had no jurisdiction to try the petition or that the petitioner was *bonâ fide* residing within the jurisdiction of the Court.

The petition was tried in the first instance before Mr. Justice Macleod who gave the following judgment.

MACLEOD, J. :—This is a petition for restitution of conjugal rights. The petitioner alleges that on the 4th August 1911 she was married to the respondent by license at the Marriage Register Office in the District of Kensington in the county of London. That she professes and at the date of marriage professed the Christian religion. That the respondent was and is still a Parsi. That the petitioner and respondent lived together after the marriage and early in October 1911 sailed for India. They arrived in Bombay about the end of October and except for a short visit to Poona stayed in Bombay until the 3rd February 1912 when they again sailed for Europe. On their arrival at Victoria Station the petitioner alleges that she went with the respondent's consent to despatch a message to her mother and that on her return to where she had left the respondent on the

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platform he had disappeared. On the 23rd February 1912 the petitioner got a notice from the respondent's solicitor to the effect that he did not intend to return to her but wished to provide her with such maintenance as he might be able to afford. Thereafter correspondence took place but no satisfactory settlement could be arrived at and eventually the petitioner left for India on the 19th April.

The petition was filed on the 27th June. The respondent has filed a very lengthy written statement. He contends that this Court has no jurisdiction and without prejudice to that contention he goes on to make various allegations in paragraps 2 and 8 which appear to be of little importance considering that in paragraph 9 he admits that by the 23rd February 1912 he had finally made up his mind that he would not live with the petitioner.

In the subsequent paragraphs 10 and 17 he gives the reasons which he alleges justified his refusal to live with the petitioner. On the 19th October the respondent obtained a summons for the issue of a commission to examine certain witnesses including himself in England. On the 11th November an order was made in Chambers on the summons that it should stand over till the hearing and petitioner's solicitor undertook that in the event of the summons being refused he would consent to an adjournment of the hearing for a week from the date of such refusal.

The suit came on for hearing before me on the 30th December and the following issues were raised by Mr. Setalwad, respondent's counsel :—

1. Whether the Court has jurisdiction to try this suit.

2. Whether the respondent has refused to live with the petitioner as alleged in paragraph 9 of the petition.

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3. Whether respondent is not justified in refusing to live with the petitioner by reason of—

(*a*) Antenuptial incontinence not known to the respondent.

(*b*) Cruelty on the part of the petitioner.

Mr. Weldon for the petitioner objected to issue 3 (*a*) on the ground that antenuptial incontinence could not be pleaded in answer to a suit for restitution of conjugal rights, and referred to section 33 of the Indian Divorce Act :—

"Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be a ground for a suit for judicial separation or for a decree of nullity of marriage."

The grounds for a suit for judicial separation are (1) adultery or (2) cruelty or (3) desertion without reasonable excuse for two years or upwards.

The grounds on which a decree for nullity may be made are set forth in section 19 of the Act. Antenuptial incontinence is not mentioned in that section. It seems obvious, therefore, that the defendant under section 33 cannot plead antenuptial incontinence in answer to this petition and that the portion of paragraph 17 of the written statement under heading A and also paragraph 10 contain allegations clearly barred by section 33.

Mr. Setalwad argued that under section 32 the petitioner must prove that the respondent had withdrawn from her society without reasonable excuse and that he was entitled to cross-examine the petitioner with the object of showing that the respondent had reasonable excuse for leaving her apart from having grounds for doing so within the meaning of section 33.

The answer to this argument is that the onus of proving reasonable excuse for withdrawing from his

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wife's society lies on the respondent and it is not for the petitioner to prove that he had no reasonable excuse for his conduct. The law enacted by the Indian Divorce Act does not differ materially from divorce law in England.

In *Yeatman* v. *Yeatman*[1] there was a petition for judicial separation on the ground of desertion without reasonable cause for two years and upwards. At page 491, Lord Penzence, the Judge Ordinary said : " Now, it must be borne in mind that, according to the matrimonial law of this country, which the Divorce Acts have not affected to touch on this head, nothing will justify a man in refusing to receive his wife, except the commission of some distinct matrimonial offence such as adultery or cruelty, upon which the Court could found a decree of judicial separation And that in all other cases, no matter what her conduct, she can always claim a decree enforcing co-habitation."

It had been repeatedly enunciated in the Ecclesiastical Courts that nothing could be pleaded as a bar to a suit for restitution of conjugal rights which could not be a ground for a divorce *a mensâ et toro* in *Burroughs* v. *Burroughs*[2] No doubt if the petitioner had been suing for a judicial separation on the ground of desertion without reasonable excuse for over two years, the respondent could have pleaded on the authority of the English cases cited in note (*m*) at page 181 of Volume 16 of Halsbury's Laws of England that he was justified in deserting the petitioner on grounds other than those of adultery or cruelty, but in India it is a different matter when the petitioner is suing to enforce co-habitation and it was so in England until the passing of the Matrimonial Causes Act of 1884. By section 5 of that Act a party who has obtained a decree for restitution of conjugal

(1) (1868) 1 P & D 489 (2) (1861) 30 L. J Mat 186

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rights can if the other party refuses to comply with the decree, at once sue for a judicial separation on the grounds of desertion without reasonable cause.

In *Russell* v. *Russell*[1] it was held by the Court of Appeal that the section gave the Court in a suit for restitution of conjugal rights a power to refuse a decree which it had not before and that, therefore, the Court could allow a respondent greater latitude in justifying his or her conduct in refusing co-habitation. The reason given was that otherwise a petitioner who had obtained a decree for restitution of conjugal rights could, if it was not complied with, get a judicial separation without the respondent being able to rely on grounds which would have been a sufficient answer if a petition for judicial separation had been originally filed under section 16 of the Matrimonial Causes Act of 1857. The *ratio decidendi* makes it clear that the decision in *Russell* v. *Russell*[1] which was relied on by Mr. Setalwad does not apply to a petition for restitution of conjugal rights under the Indian Divorce Act

If section 32 had stood alone, it would have been open to the respondent to justify his conduct by proving any reasonable excuse, such as would have been an answer to a suit for judicial separation on the ground of desertion. But section 33 makes it quite clear that there was no intention on the part of the Indian Legislature to make such a complete departure from the matrimonial law of England as it existed in 1868. The onus being on the respondent he cannot plead anything which would not be a ground for a suit for judicial separation, that is to say, adultery or cruelty on the part of the petitioner or desertion of him by her without reasonable excuse. If his pleading is limited to those grounds anything outside them is irrelevant. Mr. Setalwad

(1) [1895] P. 315.

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relied on a passage in Rattigan on the Indian Divorce Act in which the learned author suggests that though a respondent is limited as to his pleading still he can put the petitioner to the proof that his withdrawal was without reasonable excuse and that the petitioner can be cross-examined as to matters which led to the withdrawal but the learned author appears to have omitted to realise that the onus of proving reasonable excuse is on the respondent, that section 33 defines what excuse he can plead and outside those there can be no questions at issue on which cross-examination of the petitioner could be relevant In *Mason* v. *Mason*[1] in a petition for restitution of conjugal rights it was held by Butt, J., that evidence of prenuptial incontinence was inadmissible as irrelevant to the question of issue, though it might now be relevant in England under the decision in *Russell* v. *Russell*.

Assuming for a moment that the petitioner admitted in cross-examination all that the respondent has alleged in his written statement, that would in no way affect her rights to a decree. But there is no reason why the Courts should allow cross-examination which can in no way affect the merits of the case. In my opinion sections 32 and 33 must be read together and section 33 must be taken to define the limits of what is a reasonable excuse in section 32.

I, therefore, struck out issue 3 (*a*).

The issues having been settled I dealt first with the first issue regarding jurisdiction. Section 2 of the Indian Divorce Act gives the Court jurisdiction only in cases when the petitioner professes the Christian religion and resides in India at the time of presenting the petition. It is not disputed that the petitioner professes the Christian religion an[illegible] in Bombay at the time

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the petition was presented. Mr. Setalwad did not suggest that the petitioner had any permanent residence out of India but argued that she could not be held to reside in Bombay as she only came to Bombay for the purpose of filing the petition.

He relied on a passage in Rattigan's Law of Divorce in India at page 6: "But, although for the purposes of Indian Municipal Law, mere 'residence' in India is sufficient, it is submitted that such residence must be at least *boná fide* and not that of a mere casual traveller. Nor must it be a merely colourable residence for the purpose of obtaining relief under the Act." The Act does not define the word "reside". To "dwell" is to "reside". There is no distinction between residing and dwelling used in its ordinary signification. The decision which has been arrived at in affixing a meaning to the one word would be a safe guide in determining the meaning to be attached to the other. See per Farran, J., *Shri Goswami* v. *Shri Govardhanlalji*[1].

In *Fernandez* v. *Wray*[2] the defendant arrived in Bombay from Kolapur on his way to England on the 7th March. The plaint was lodged on the 8th March and the defendant sailed on the 10th. The plaint was rejected by Russell, J., for want of jurisdiction under clause XII of the Letters Patent, but this decision was reversed on appeal. Jenkins, C. J., said "Ordinarily no doubt it would not be said that a man remaining here for so short a time was dwelling here but that is because he would ordinarily have a permanent dwelling or residence elsewhere. The cases show that *primâ facie* a man may be said to dwell where he is now staying at any particular time, but it is open to him to show that he is not dwelling there but at some other place."

[1] (1890) 14 Bom 541 at p 547. [2] (1900) 25 Bom. 176.

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Tyabji, J., said "I think that the words 'reside' and 'dwell' have a narrow or more extended meaning according to the intention of the Legislature in the various Acts in which they occur. For the purpose of jurisdiction I think the authorities establish that, if a person has no permanent residence he may be said to dwell wherever he may be found." No doubt that was a case of a defendant seeking to avoid the jurisdiction of this Court while the petitioner here is claiming that the Court has jurisdiction to give her relief, but there cannot be one meaning attached to the words "reside" or "dwell" for a defendant who says he does not reside or dwell within the jurisdiction and another for a plaintiff who claims relief because he does reside or dwell within the jurisdiction, so that as far as I can see the dicta above-quoted must apply to this case There have been decisions under the Indian Insolvent Act to the effect that a petitioner who came within the jurisdiction of a Court for the relief of insolvent debtors merely for the purpose of filing his petition could not be said to reside within the jurisdiction within the meaning of the Act but in all those cases the petitioner was proved to have a permanent residence outside the jurisdiction.

All that the Divorce Act requires is that the petitioner should reside in India at the time of presenting the petition. If she had a permanent residence out of India it might be argued that she resided there and not in India but as I have already stated there has been no attempt even to suggest that she has such a residence.

Therefore she is either debarred from residing anywhere which is absurd or as laid down by Jenkins, C. J., she resides where she is staying at any particular time. Ordinarily she would reside with her husband but as he admittedly refused to allow her to live with him, she is cast adrift to reside where she can. With all respect for the learned author quoted by Mr. Setalwad it is not

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a question of *bonâ fide* or colourable residence whatever those words may mean but whether there is residence within the meaning attached to that word by the authorities.

I do not think it can be disputed that the petitioner came to Bombay in order to file her petition, but that could only be material if she had a permanent residence out of India. Under the circumstances Bombay would be the best place for her to seek relief. *Primâ facie* the respondent is domiciled in India, according to him the visit to Europe in 1912 was made owing to the importunity of the petitioner but without any prospect of his getting employment or settling down in England. I don't say that the domicile of the respondent affects the question of residence, but if the petitioner had stopped in England and filed a petition there it is not unreasonable to suppose that the respondent would have returned to India. A petition for restitution of conjugal rights is not filed for the purpose of obtaining that relief but merely as a step towards obtaining permanent alimony. In *Marshall* v. *Marshall*[1] Sir James Hannen said: "And I must further observe that so far are suits for restitution of conjugal rights from being in truth and in fact what theoretically they purport to be, proceedings for the purpose of insisting on the fulfilment of the obligation of married persons to live together, I have never known an instance in which it has appeared that the suit was instituted for any other purpose than to enforce a money demand."

The petitioner might think not unreasonably that she had a greater chance of ultimate success by proceeding in India rather than in England. Mr. Setalwad relied on a letter written by the petitioner to her English

(1) (1879) 5 P. D. 19 at p. 23.

solicitor on the 8th March 1912. That was a private letter which strange to say petitioner's solicitor sent on to the respondent's solicitor in clear breach of his duty to his client. Petitioner wrote "should I endeavour to help myself in England from all I know of the people I have to deal with they would use their usual method of 'slipping of'. Therefore I am utterly determined to go to India as soon as the necessary arrangements for my going and remaining there the necessary time, etc., are completed." But whether she intends to leave Bombay or stop in Bombay after the proceedings have terminated seems to me quite immaterial. I read the Act as it stands: if the petitioner is not residing in Bombay she is not residing anywhere, and to hold that would be a denial of justice. I, therefore, held that the Court had jurisdiction to try the case. The marriage was admitted and as the respondent in his written statement admitted that he refused to live with his wife there was no necessity to deal with the second issue. The only issue, therefore, which remained to be tried was issue 3 (*b*) whether the petitioner had been guilty of cruelty which would entitle the respondent to obtain a judicial separation It then became necessary to deal with the respondent's summons for a commission.

The witnesses whom the respondent wished examined are set forth in the affidavit of Mr. Batliwalla, managing clerk of respondent's solicitors, sworn on the 19th October.

They were to give evidence on matters which I have held to be irrelevant and therefore no commission could issue for the examination. I then considered whether a commission should issue for the examination of the respondent.

I declined to make such an order in the case of a respondent who alleged cruelty by his wife to himself,

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especially when the application was supported only by an affidavit of a managing clerk. In such a case it was very desirable that the respondent should be before the Court unless very good grounds were shown for his inability to attend. That had not been done.

I then offered to adjourn the hearing so as to give the respondent an opportunity of giving evidence before me and Mr. Setalwad said that the respondent would not attend. It would then have been possible to pass a decree in favour of the petitioner but Mr. Setalwad asked for a week to consider his position and referred to the undertaking given by Mr. Crawford to the Judge in Chambers at the argument of the summons. I therefore adjourned the suit for a week. When the suit came on again for hearing on the 7th December Mr. Inverarity appeared for the respondent with Mr. Setalwad. Apparently advantage was taken by respondent's solicitors of the fact that Mr. Inverarity had only arrived from England the day before to instruct him that nothing had been decided on the 30th of November except the discharge of the summons for a commission since Mr. Inverarity contended that he was entitled to argue afresh all the issues which I had decided on the 30th of November, on the grounds as far as I could gather that if anything had been decided it was only for the purpose of determining whether or not a commission should issue on the summons of the 19th October. A perusal of my notes of what occurred on the 30th November would have made it clear what had been done. Whether I was right or wrong was quite a different question. The suit was called on for hearing and issues were raised according to the provisions of the Civil Procedure Code. The question of jurisdiction had to be decided in the suit and not on the summons, since it was obvious that if the Court had no jurisdiction there was an end to the proceedings, and the summons

was adjourned to the hearing in order that the question of jurisdiction might be decided first. The suggestion that I had decided that question only on the summons was not founded on fact. My notes show that the pleadings were read and issues were then raised by respondent's counsel. I was not asked to limit the issues for the purpose of deciding the summons and if I had been I should have declined to do so as contrary to correct procedure and opening the way to the absurd possibility of the Court granting the summons because it had jurisdiction; then rejecting the petition because it had no jurisdiction. Orders in interlocutory proceedings may be made before the hearing on the assumption that the Court has jurisdiction to try the suit, but the object of adjourning this summons to the hearing was to enable the Court first to decide the question of jurisdiction in the suit. An application for a Commission to examine a witness is merely an application that the evidence of a witness should be taken in a particular way. It is made before the hearing as a rule, in order to save time: when the application is adjourned to the hearing the Court is in a better position to decide whether it should be granted when the time comes for examination of the witness supposing he were present in Court. If Mr. Setalwad had continued to conduct the case, it would have been quite impossible for him to have adopted the course taken by Mr. Inverarity. Mr. Setalwad must have known perfectly well what was being done at the first hearing, he raised no objection and gave me no notice whatever that an attempt would be made, when the suit came on for hearing again, to re-open the discussion on the issues which had been decided, on the ground that they had been decided for a limited purpose. He accepted my findings and merely asked for time to consider his position before the Court passed a decree. The respondent admitted the marriage, admitted the

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petitioner was residing in Bombay (though he contended she was not residing *bonâ fide*), admitted that he had refused to live with the petitioner and informed the Court through his counsel that he had no intention of appearing in Court to give evidence to support his plea of cruelty. The Court was therefore perfectly competent to pass a decree in favour of the petitioner, but Mr. Weldon put his client in the box *pro formâ* to deny the allegations of cruelty contained in paragraph 17B of the written statement and I directed that though the marriage was admitted, the marriage certificate should be put in.

Mr. Inverarity then cross-examined the petitioner at considerable length, about the last voyage to Marseilles and London, and the correspondence that took place between the parties and their respective solicitors in London. The greater part of this evidence was irrelevant but I allowed counsel the greatest latitude so that he might have on the record what he wanted.

Petitioner was cross-examined about the letter she wrote to her solicitors on the 8th March although I have already pointed out that, that letter ought never to have come into the respondent's hands. Petitioner admitted that the last paragraph was correct. She was in Bombay remaining until the proceedings terminated. The passage did not mean that she was going back afterwards.

Mr. Inverarity then contended he was entitled to cross-examine petitioner on the allegations in paragraph 17A of the written statement in spite of issue 3 (*a*) having been struck out. It seemed clear that if the respondent was not entitled to plead the allegations in paragraph 17A, they must be struck out, and it followed that any questions based on those allegations were irrelevant.

Mr. Inverarity wished to re-open the argument as to whether the allegations in paragraph 17A were relevant or not, but I declined to review my decision arrived at on the 30th of November. Mr. Inverarity next wished to cross-examine the petitioner about alleged misrepresentations made by her before the marriage and other allegations contained in paragraph 10 of the written statement. Counsel contended that under section 32, he was entitled to cross-examine the petitioner in order to obtain admissions that the respondent had reasonable excuse for leaving her oblivious to the fact that the only excuse relied upon by Mr. Setalwad except cruelty was prenuptial incontinence, but I refused to allow any question to be put with regard to paragraph 10 and struck it out as contrary to the provisions of section 33.

In re-examination Mr. Weldon put in the message written by the petitioner to her mother from the District Messenger Office at Victoria to refute the allegations raised at one time by the respondent, that he had been deserted by the petitioner. In view of respondent's letter of the 23rd February 1912, this was hardly necessary.

This closed the case for the petitioner. Mr. Inverarity complained that he was precluded from calling evidence to support his case. It was not alleged that there was any evidence to support the plea of cruelty except that of the respondent and I had given him an opportunity of giving evidence.

Counsel's complaint was, therefore, not founded on fact. Counsel further complained that he had not been allowed to argue the question of jurisdiction and contended a question of jurisdiction could not be decided without evidence. As to this it is permissible to point out that I decided that question on facts admitted on the pleadings, and that Mr. Setalwad, when the issue was

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being tried, did not raise this point nor did he apply for leave to cross-examine the petitioner.

However now that the petitioner's evidence is on the record it is clear that it would not have assisted the respondent. Petitioner could not be compelled to make any plans, as to what she would do when the proceedings terminated. That would depend entirely on how they terminated. I passed a decree in favour of the plaintiff for restitution of conjugal rights with costs throughout.

Against this decision the respondent appealed.

Strangman with *Inverarity* and *Setalwad* for the appellant and respondent :—

The petitioner did not reside in India; she came to file this suit and nothing else.

It is unnecessary to consider section 3 of the Indian Divorce Act in view of section 2: refers to *In the matter of Tietkins*[1]; *In the matter of Ram Paul Singh*[2].

In the matter of De Momet[3]; Dicey on the Conflict of Laws, page 801, note; Indian Divorce Act, section 3; *Jogendra Nath Banerjee* v. *Elizabeth Banerjee*[4]; *Queen-Empress* v. *Sarya*[5].

The learned judge was wrong in considering domicil at all.

Refers to *Massey* v. *Burton*[6].

(Per Curiam: *Thornton* v. *Thornton*[7], referred to.)

As to the right to cross-examine as to reasonable excuse relies on *Russell* v. *Russell*[8]; and to Rattigan on Law of Divorce, page 177.

(1) (1868) 1 Ben. L. R. (O. C.) 84.
(2) (1881) 8 Cal. L. R. 14.
(3) (1894) 21 Cal. 634 at p. 638.
(4) (1898) 3 Cal. W. N. 250.
(5) (1890) 15 Bom. 505.
(6) (1857) 27 L. J. Ex. 101.
(7) (1886) 10 Bom. 422.
(8) [1895] P. 315.

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The facts constitute a reasonable excuse: see as to antenuptial misconduct, *Perrin* v. *Perrin*[1]; *Green* v. *Green*[2], distinguished it is admitted that it cannot be pleaded: Halsbury, Volume 16, page 473, referred to.

Under section 7 of the Indian Divorce Act subject to the provisions of the Act the English rules apply.

Refers to *Yeatman* v. *Yeatman*[3].

No provision exists in India as is provided by section 5 of the Matrimonial Causes Act.

Also refers to *In re Norton's Settlement*[4]; *Norton* v. *Norton*[4]; and *Arthur Flowers* v. *Minnie Flowers*[5].

Kemp, for the respondent and petitioner:—

The petitioner and the respondent last resided together in India. There could be no residence on the ship.

In the matter of Ram Paul Singh[6] not to be followed as there is no residence outside and cases on the Insolvency Act have no application The last lines in that case speak as if only one creditor opposed but the others did not oppose.

Mahomed Shuffli v. *Laldin Abdula*[7]; *Massey* v. *Burton*[8]; *Fernandez* v. *Wray*[9]; *Bater* v. *Bater*[10]; *Holmes* v. *Holmes*[11]; and *Rippingall* v. *Rippingall*[12], also relied on.

Strangman replies.

C. A. V.

SCOTT, C. J.:—The first question that arises is whether the Court has jurisdiction to entertain this suit which is for restitution of conjugal rights.

(1) (1822) 1 Add 1
(2) (1869) 21 L T 401
(3) (1868) L. P. & D 489
(4) [1908] 1 Ch. 471
(5) (1910) 32 All 203 at p 205
(6) (1881) 8 Cal L R 11
(7) (1878) 3 Bom 227
(8) (1857) 27 L J Ex 101
(9) (1900) 25 Bom 176
(10) [1906] P 209
(11) (1755) 2 Lee 116
(12) (1876) 24 W R (Eng) 967

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The petitioner is an English woman professing the Christian religion.

The respondent is a Parsi whose parents reside in Bombay.

The parties were married in London on the 4th of August 1911.

On the 11th of October in that year they started for India and arrived in Bombay about the end of that month.

On the 3rd of February 1912, they left Bombay again for London travelling *viâ* Marseilles. They arrived at Victoria Station in London, on the 19th of February 1912, where the respondent left the petitioner. He has since refused to live with her though offering her a certain maintenance. It is alleged on affidavit that subsequent to February 1911 he has obtained employment as a commercial traveller on £200 per annum in England.

On the 8th of March 1912, the petitioner announced her intention of going to India to bring her case before an English Judge "as soon as the necessary arrangements for her going and remaining there the necessary time, etc., were completed."

She started for Bombay to carry out her resolution on the 19th of April, and arrived on the 10th of May 1912. She filed her petition for restitution in this Court on the 27th of June.

The learned Judge finds as a fact, and it is not disputed, that she came to Bombay in order to file her petition. He was of opinion that this Court had jurisdiction to try the suit, under section 2 of the Indian Divorce Act, if it found that the petitioner professed the Christian religion and resided in Bombay at the time of presenting the petition; and being of opinion

that she had no permanent residence anywhere else decided the issue of jurisdiction in her favour.

The provisions of section 2 of the Act relating to or affecting jurisdiction are of a negative and exclusive character except the first clause which relates to its local extent: clause 2 prevents the Court from granting any relief except where the petitioner professes the Christian religion and resides in India at the time of presenting the petition.

Clause 3 prevents the Court from dissolving marriages except in the case of Indian marriages—or where certain specified matrimonial offences have been committed in India or where the husband has abjured the Christian for some other form of religion.

Clause 4 prevents the Court from making decrees of nullity except in the case of Indian marriages.

Section 4 confers upon the High Courts and District Courts subject to the provision of the Act "the jurisdiction now exercised by the High Courts in respect of divorce *a mensâ et toro*, and in all other causes, suits and matters matrimonial."

By section 9 of the High Courts Act such matrimonial jurisdiction was conferred on the High Courts as Her Majesty might by Letters Patent grant and direct and it was provided that save as by such Letters Patent might be otherwise directed and without prejudice to the legislative powers of the Governor-General the High Court in each Presidency should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Supreme Courts.

The ecclesiastical jurisdiction of the Supreme Courts was limited to persons described and distinguished by the appellation of British subjects, residing in the Town and Island of Bombay and the factories subordi-

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nate thereto and all the territories dependent upon the Government of Bombay. It was held in *Ardaseer Cursetjee* v. *Perozeboye*[1] that this jurisdiction could not be exercised over Parsis.

By clause 35 of the Amended Letters Patent of the High Court that decision was given effect to by limiting the jurisdiction within the Presidency to "matters matrimonial between Our subjects professing the Christian religion."

In clause 33 of his Despatch of the 14th May 1862, which accompanied the original Letters Patent, the Secretary of State wrote: "Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court as to 'matters matrimonial' in general, as they now are under the Supreme Court, and this they believe to be effected by clause 35 of the Charter. But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce, which the Supreme Court does not possess, in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established in virtue of 20 and 21 Vic. c. 85......I request that you will immediately take the subject into your consideration, and introduce into your Council a bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England."

The Indian Divorce Act of 1869 was apparently enacted as a consequence of this request. That Act by sections 10—17 conferred on the Indian Courts jurisdiction to grant decrees for divorce, that is dissolution, subject however to the limitations stated in section 2. It would not apparently be necessary that both parties

(1) (1856) 6 Moo. I. A. 348

to a divorce petition should profess the Christian religion. Nor is this a necessity in the case of petitions for nullity provided for by sections 18—21. But as regards the jurisdiction confirmed to the High Court by section 4 (which includes suits for restitution) the powers of the Courts are still limited to Christian subjects within the Presidency.

For this reason I am of opinion that the Court has no jurisdiction to grant a decree for restitution either against a Parsi respondent or a respondent not within the Presidency.

The same result may be arrived at by another train of reasoning. Section 7 enacts that subject to the provisions contained in the Act the High Courts and District Courts shall in all suits and proceedings hereunder act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

It is established by the following cases that the Court will not give relief by way of restitution if the respondent named in the petition was absent from the jurisdiction at the time the suit was instituted and remains absent, although residence at date of suit of both spouses, whatever the domicile, is sufficient to give jurisdiction in suits of this nature: see *Firebrace* v. *Firebrace*[1]; *Chichester* v. *Chichester*[2]; and *Armytage* v. *Armytage*[3].

In *Firebrace* v. *Firebrace*[1] the respondent who was absent from England at the date of the suit was an Australian. Sir James Hannen said (p. 68): "In a suit for restitution of conjugal rights the primary object is

[1] (1878) 4 P. D. 63   [2] (1885) 10 P. D. 186

[3] [1898] P. 178

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to control the husband. She asks that her husband shall in the future be compelled by the process of the Court to take her back to live with him in a common home. In other words, she prays that the English law shall be put in force against him, but as the obligation of a foreigner to obey the laws of this country lasts no longer than the time during which he is within its jurisdiction, the tribunals of this country cannot call upon him to obey those laws after the obligation has ceased. The difficulty, amounting in most cases to an impossibility, of enforcing the decree of the Court in the circumstances of the present case lends additional force to the arguments against the existence of the jurisdiction." These remarks appear to me to be applicable to the present case although Bombay may be the respondent's domicile of origin: for the matrimonial jurisdiction of the Indian Courts is in no way based *upon domicile.*

Another aspect of the question of jurisdiction may be based upon an argument suggested by the case of *Thornton* v. *Thornton*[1] in which counsel suggested that the jurisdiction of the Bombay High Court in a suit for divorce was based on section 15 of the Divorce Act which imported section 17 of the Civil Procedure Code and thus gave jurisdiction where the cause of action arose. Cotton, L. J., seems to have accepted this as the basis of the jurisdiction claimed.

The jurisdiction was really, I think, based on the alleged residence of the petitioner in India coupled with commission of the act of adultery whilst the parties last resided together in India: see *Thornton* v. *Thornton*[1]; and this would be by virtue of section 10 of the Divorce Act read with section 2. The argument, however, suggests that in the case of other matrimonial

[1] (1886) 10 Bom. 422 at p. 431.

offences the application of the Civil Procedure Code will involve the necessity either of residence on the part of the defendant or the accrual of the cause of action within the jurisdiction in order to enable the Court to entertain the suit.

I may add that I am by no means satisfied that the petitioner was residing in India within the meaning of section 2 at the time of the petition. In *Manning* v. *Manning*[1] it was held that mere residence in England at the time of the institution of a suit for judicial separation is not sufficient to found the jurisdiction of the Court. The residence of the petitioner must be *bonâ fide* and not casual or as a traveller.

I think the Court has no jurisdiction and the petition must be dismissed

CHANDAVARKAR, J. :—I concur.

The attorney for the petitioner applied to the Court for an order directing the Prothonotary to retain the monies paid by the respondent as security for the petitioner's costs pending taxation of his costs and to pay him his taxed costs out of those monies. On the 12th of April 1913 the question was argued before Scott, C. J., when his Lordship delivered the following judgment.

SCOTT, C. J. :—The proceedings in which this application is made were initiated by a petition for restitution of conjugal rights by Mrs. Wadia, a Christian, against Mr. Wadia, a Parsi.

Mr. Crawford of the firm of Crawford Brown & Co. was appointed attorney for Mrs. Wadia, and upon his application an order was made by the Chamber Judge, on the 19th of October 1912, for the deposit by the

(1) (1871) 2 P. & D. 223.

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respondent of Rs. 600 as security for the petitioner's costs. That sum was deposited on the 11th of November 1912. According to the terms of the order it was to cover the petitioner's costs already incurred and to be incurred. The order was made under the settled practice of this Court to follow, in matters relating to costs under the Indian Divorce Act, the practice of the Divorce Courts in England.

The petitioner obtained an order for restitution from Mr. Justice Macleod. An appeal was preferred against his decision upon which the appellant in accordance with the rule of the Court deposited Rs. 500 as security for the respondent's costs. The appeal was successful in that the Court held that it had no jurisdiction to award the relief prayed for to the petitioner, and it declined to make any order for the payment of the respondent's costs by the petitioner having regard to the ground of the decision in the appeal.

Mr. Crawford, the petitioner's attorney, now applies that the Prothonotary be directed to retain the monies in Court pending taxation of his costs and to pay to him the costs when so ascertained out of the monies so deposited on the ground that those sums must be applied in the first instance in satisfaction of his taxed costs as it is the established rule of the Divorce Court not to deprive the wife's solicitor of his costs out of the fund intended for his payment unless he has himself done something to justify so strong a measure. See *Flower* v. *Flower*[1] and *Robertson* v. *Robertson*[2].

On behalf of the respondent it is contended that the solicitor has no *locus standi* in the matter. That position appears to me not to be tenable having regard to the more recent decisions of the Divorce Court in England and Ireland showing that application by

[1] (1873) 3 P. & D. 132. [2] (1881) 6 P. D. 119.

solicitors with reference to their costs have repeatedly been entertained. See *Joseph* v. *Joseph and Burnhill*[1], *Nairne* v. *Nairne*[2], *Ballance* v. *Ballance*[3], and *Jinks* v. *Jinks*[4].

The next question is whether the attorney is right in contending that the money deposited must be treated, whatever the result of the petition, as a fund for his security. In *Hall* v. *Hall*[5], Lindley, L. J., said :—

"The £45 ordered to be paid into Court in this case was intended to enable Mrs. Hall to obtain legal assistance in the divorce proceedings instituted against her, and her solicitor naturally looked to this fund for his remuneration in conducting her defence. In the ordinary course of events he would have had his costs taxed and paid before the motion for a new trial came on for hearing, but the husband who paid the money into Court has caused the payment out to be delayed, and the money is still in Court. The motion for a new trial was dismissed with costs, and the husband has applied for payment of his costs of the appeal out of this £45. The money being still in Court, the High Court, and, on appeal, this Court, clearly has jurisdiction over the fund, but considering the purpose for which it was paid into Court, and the established rule that the Court will not deprive the wife's solicitor of his costs out of the fund intended for his payment unless he has himself done something to justify so strong a measure...we do not think it right upon the present occasion to accede to the application of the husband."

In *Hurley* v. *Hurley*[6], Mr. Justice Collins made the following observations with regard to the practice in the Divorce Court :—

"The rule is that, whether the wife is successful or not, the husband is bound to furnish her with the means of carrying on the litigation, and the practice has been for the Registrar to estimate a reasonable amount for her costs, which is either paid in or security is given for it. If he has made an accurate estimate, so much the better for the wife, but if his estimate is found insufficient when the trial comes on the practice is to enlarge the amount paid in by the husband, so that the wife may continue to be in funds, and to that she is entitled although the result may be that she is divorced. The practice, therefore, seems to me to be that the husband is bound to furnish

[1] (1897) 76 L. T. 236
[2] (1901) 85 L. T. 649
[3] [1899] 2 I. R. 128
[4] [1911] P. 120
[5] [1891] P. 302
[6] [1891] P. 367

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the estimated amount for the wife's costs entirely independent of the result There has been an exception engrafted on that rule that, if the result of the litigation turns out to be unsuccessful for the wife—if she is found guilty—the Court refuses to enlarge the amount which has been deposited. Where that practice comes from I do not know, but it only comes into consideration when the wife has been found guilty, which is not the fact here."

Upon these authorities, I think the attorney of the petitioner is justified in his contention that the fund paid in is for the benefit of her attorney and she is entitled to have it so applied whatever the result of the petition, provided of course that the attorney is in no way to blame. The case of *Walker* v. *Walker and Lawson*[1] shows that the solicitor or attorney who takes up a hopeless case must not assume that his costs will be provided for. But having regard to the fact that the petitioner secured an order on her petition in the lower Court and that the point of jurisdiction, upon which the petition was decided in appeal, does not appear to have occurred to the Counsel on either side, I cannot say that in this case the attorney was to blame for taking up the case.

Then, it is contended that, if the attorney is entitled to have the first sum deposited applied in payment of his taxed costs, he has not the same right in relation to the second sum of Rs. 500 as that would have been deposited in the case of any appeal. I think, however, that it may be safely assumed that if there had been no rule providing for a deposit of Rs. 500 by the appellant, the attorney would have made a further application for the deposit and that application would have been granted by the lower Court or the Chamber Judge.

My order is that the sums of Rs. 600 and Rs. 500 be retained in Court and be paid out so far as may be necessary in satisfaction of the taxed costs of the petitioner's attorney, and that the balance, if any, after

[1] (1897) 76 L. T. 234.

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these costs shall have been satisfied, be paid out on the application of the respondent's attorneys.

I make no order as to costs of this notice, because I think that the attorney should have been more prompt in getting his costs taxed and in applying that the fund in Court should be paid out in satisfaction of those costs.

Attorneys for the appellant . *Messrs. Wadia, Gandhi & Co.*

Attorneys for the respondent : *Messrs. Crawford, Brown & Co.*

Order accordingly.

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah

BAI UJAM (ORIGINAL PLAINTIFF, DECREE-HOLDER), APPELLANT, v. BAI RUXMANI (ORIGINAL DEFENDANT, JUDGMENT-DEBTOR), RESPONDENT.[*]

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Limitation Act (IX of 1908), section 15—Decree—Execution of decree—Application to execute the decree—Exclusion of time—Period during which execution of decree is stayed to be excluded in computing period of limitation.

On the 8th August 1908, an application to execute a decree was made. The Court having directed the execution to proceed as to a part of the decree, the judgment-debtor appealed against the order and pending the appeal the execution of the decree was stayed from the 9th January to the 18th February 1909. On the 12th August 1911, the decree-holder applied again to execute the decree. The lower Courts held that the second application was barred by limitation, it having been made more than three years after the date of the first application. On second appeal:—

Held, that the second application was filed within time, for the applicant was entitled to exclude the period during which the execution of the decree was stayed, in computing the period of limitation for the second application.

[*] Second Appeal No. 859 of 1912.

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SECOND appeal from the decision of E. H. Waterfield, Acting District Judge of Broach, confirming the order passed by B. H. Desai, Subordinate Judge at Ankleshwar.

Proceedings in execution.

The plaintiff Bai Ujam filed a suit against Bai Ruxmani (defendant) in the Court of the Subordinate Judge at Ankleshwar, to recover her *palla* money which was deposited with her father Jagjivan, who was father-in-law of the defendant. The Court passed a decree against the defendant personally and against the estate of Jagjivan. The plaintiff executed the decree and recovered its amount from the defendant.

The defendant appealed against the decree. In appeal, the decree was reversed. The defendant next applied to recover back the money from the plaintiff. She was allowed to do so on her furnishing security for the amount. Motilal thus became a surety for her.

In the meanwhile, the plaintiff appealed to the High Court, where the decree passed by the Subordinate Judge was restored with the variation that the defendant was not personally liable. (*See 32 Bom. 394.*)

On the 6th August 1908, the plaintiff applied to execute the decree against the defendant and her surety. The Court held that the surety was liable *only for costs* allowed by the High Court. The surety appealed against the order and pending the appeal obtained an order staying the execution of the decree from the 9th January to the 18th February 1909. *Eventually, the* surety paid up the costs.

On the 12th August 1911, the plaintiff applied again to execute the decree against the defendant. The execution was resisted on the ground that the application was barred by limitation.

The lower Courts upheld the objection and dismissed the application as barred by limitation.

The plaintiff appealed to the High Court.

G. N. Thakore, for the appellant.

G. S. Mulgaonkar, for the respondent.

SHAH, J.:—This is an appeal by the decree-holder who obtained a decree against the present respondent, and made an application for executing it on the 6th of August 1908. That application was made against the defendant and the surety. The present application was made on the 12th of August 1911. The judgment-debtor objected to the application on the ground of limitation. In both the lower Courts this plea has succeeded, and the Darkhast has been dismissed as being time-barred.

In the second appeal before us it has been contended by the appellant that the application is in time on various grounds. It is not necessary to deal with all the grounds urged in support of the appeal, as it is possible to decide the appeal on one ground only. It is an admitted fact in the case that the present defendant and the surety appealed against the order made by the Court of first instance on the 30th November 1908 directing execution to proceed as to a part of the decree, and in that appeal they obtained an order for staying the execution of the decree which remained in force from the 9th January to the 18th February 1909. It is contended on behalf of the appellant that under section 15 of the Limitation Act this period ought to be deducted from the period of limitation, and that, if that period is deducted, the present application is in time. We think that this contention ought to be allowed. Under section 15, sub-section (1), of the Limitation Act the appellant is clearly entitled to have this time excluded in computing the period of limitation in this case. The

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lower appellate Court, while dealing with this point, thought that as the order of the 30th November 1908 related only to the recovery of costs, that deduction of time ought not to be made. We think that it is perfectly immaterial for the purposes of the present point as to whether the order of the 30th of November 1908 related only to a part of the decree. If the period during which the execution of the decree had been stayed is excluded, the present application is clearly within time.

We hold, therefore, that the application is in time. The order of the lower appellate Court is reversed and the case remanded for disposal according to law.

All costs to be costs in the application.

Order reversed, case remanded.

R. R.

CRIMINAL APPELLATE.

Before Mr Justice Macleod : on reference from Mr. Justice Heaton and Mr. Justice Shah.

1913 September 13.

EMPEROR v. GANGAPPA KARDEPPA.°

Indian Evidence Act (I of 1872), section 30—Co-accused—Confession—Independent corroboration—Evidence—Practice

Eleven accused persons were tried for the offence of dacoity. There was no direct evidence against any of them. Seven of these confessed, each one implicating himself and the rest. They were convicted on their own confessions A question arose whether the remaining four accused, who had not confessed, could be convicted solely on the confessions of their co-accused when they were not corroborated by any independent evidence. Heaton, J was of opinion that section 30 of the Evidence Act made the confessions, which were already evidence in the case, evidence against the person implicated as well as the other accused. Shah, J. held that section

° Criminal Appeal No. 282 of 1912.

30 permitted the confession of a co-accused to be taken into consideration along with other evidence in the case; but if there was no evidence in the case outside those statements, no conviction based only upon the confessions of co-accused was good in law. Owing to this difference in opinion, the case was referred to Macleod, J. :—

Held, that there was nothing in section 30 of the Indian Evidence Act, 1872, which prevented the Court from convicting after taking the confession of a co-accused into consideration; but that the High Courts in India had laid down a rule of practice which had all the reverence of law, that a conviction founded solely on the confession of a co-accused could not be sustained.

Held, further, that the confession of one co-accused could not be said to be corroborated by the confession of other co-accused.

Per Macleod, J :—I do not think that "confession" in section 30 can be restricted to an unretracted confession, as once a confession is proved it may be taken into consideration.

THIS was an appeal from convictions and sentences passed by F. K. Boyd, Sessions Judge of Bijapur.

There was a dacoity on the 18th and 19th January 1913, at the house of one Ammappa at Islampur. Considerable property consisting of cash and ornaments was looted; and a number of documents and books of account were taken away. The dacoits were not recognised and the property was not traced.

Eleven persons were later on placed for trial for the dacoity. There was no direct evidence against any of them. Seven of the accused made confessions of their guilt, each one implicating himself and all the rest. Accused No. 1 confessed before the Committing Magistrate. Accused Nos. 2 and 3 confessed before a Third Class Magistrate and again before the Committing Magistrate. Accused Nos. 3, 6, 7 and 9 made confessions before a Third Class Magistrate, but retracted them before the Committing Magistrate. All of them retracted their confessions in the Sessions Court.

The seven confessing accused were convicted on their own confessions and were sentenced.

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The remaining four who had not confessed were convicted solely on the confessions of their co-accused, on the following grounds :—

I find myself here faced by a most serious difficulty. On the one hand, from the fullest consideration I can give to the case, I have not the slightest doubt that these accused are guilty. The cases of the other accused present no difficulty. But, *after all, they have confessed and made some restitution* a fact for which they are entitled to credit. From the confessions it seems accused 10 was the ringleader: and from a comparison of the value of the property stolen and of that recovered I am led to the conclusion that leading parts were played by these four accused. If the others go to jail for this dacoity while these four accused go free it will amount, in my opinion, to a travesty of justice On the other hand, I am faced with the ruling in *Queen-Empress* v. *Khandia bin Pandu* [(1890) I. L. R. 15 Bom. 66] that no conviction can alone be based on confession of co-accused—a ruling of this High Court, with which, with the greatest deference, I find I cannot agree (I regret that the provisions of section 432 of the Criminal Procedure Code do not apply to Sessions Judges: if they did, the difficulty would be easy to solve.) The ruling is of 23 years ago and has not, so far as I can discover, been referred to in any subsequent reported case of *this* High Court. I think it possible, even probable, that their Lordships would now dissent from it. In this belief, I venture, with the greatest deference, to state the grounds of my disagreement.

The ruling is based on two reasons. The first is that, while confessions by co-accused can be taken into consideration under section 30, "they are not technically evidence within the definition given in section 3 of the Act.........and they could not, therefore, *alone* form the basis of a conviction." I know of no authority for the position that convictions can *only* be based on "evidence," as defined. I can at once instance two cases in which perfectly good convictions are not so based—on plea of guilty and on confession. In the first of these cases there is no "evidence," and in the second there need not be any. A conviction might, too, be based on matters of physical fact: yet these are not "evidence" at all. "Proved," as defined, depends on consideration of "the *matters*" before the Court—not the "evidence" only The second reason is that such confessions cannot be allowed such weight as can legally be given to the sworn testimony of an accomplice who *gives evidence subject to cross-examination. That a confessing co-accused* ranks below an accomplice is a *dictum* to be found in many cases. With the greatest deference, I find myself unable to understand it. An accomplice has actual inducement to implicate. It is the means whereby he earns his pardon. The value of an oath, in such circumstances, I should take to be

absolutely nothing. He can be prosecuted for perjury, but that is an extremely remote possibility. On the other hand, a confessing co-accused gives the guarantee that he is tarring himself with the same brush (*Empress of India* v. *Gauraj* (1879) I. L. R. 2 All. 444). What this guarantee is worth is a question in each case, but at any rate it is worth something; while an accomplice not only has no guarantee but, so to speak, exactly the contrary. This guarantee may very easily out-weigh that given by the fact that accomplices can be cross-examined. Cross-examination, in very many cases, is a weapon of very doubtful utility. In this case, for instance, I have no doubt that any degree of cross-examination would only have confirmed the truth of the confessions.

I venture to submit an objection more fundamental. The ruling in *Khandia's case* appears to me an actual alteration and limitation of the law. Section 30 lays down that "the Court *may* take into consideration such confession." The ruling lays down that the Court *cannot* take it into consideration except "along with evidence." If this had been the intention of the Legislature it would, or should, have been expressed. It has not been expressed and even if it were the intention, it is never legitimate interpretation to supply a *casus omissus* or to fill a *lacuna*. I venture to think that it would have been perfectly right to lay down that such confessions in such circumstances should be considered with extreme jealousy and suspicion, and I do not consider them. But not that in any circumstances they cannot be considered at all. As Knox, J., said in *Emperor* v. *Kehri* ((1907) I. L. R. 29 All. 434) "Does the law anywhere forbid a Court.........from considering at all against persons tried jointly.........a confession made by one of such persons affecting himself and the persons who were being tried jointly, when such confession has been subsequently withdrawn? It appears to me that this is a limitation *which does not exist in*, and *would have to be introduced* into the words used in section 30 of the Indian Evidence Act, 1872, and that to do so *would be not to follow the law as it stands but to legislate*" at p. 439.

This case is on a slightly different point (I quote it again on that point later) but the reasoning seems to apply.

The matter appears to me roughly parallel to the question of the value to be attached to accomplice evidence on which hundreds of rulings—heretofore—have turned. The true meaning of section 30 appears to me as clear as that of the much debated sections 133 and 114 (*b*) of the Evidence Act. There are many and strong reasons why an accomplice or a confession by a co-accused, should not be believed. But one must, and the other may be considered. And if, after full consideration of these reasons, a Court *believes* either then it must act on the belief. I venture to think that the expression "Such weight *as can legally be given.........*" (p. 67) is not correct. I know of no law which prescribes the *weight* to be given to any kind of evidence. The law merely

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lays down what evidence is admissible : as to the weight to be attached to it after admission, to the best of my belief, it is entirely silent. (It may be said that the second part of section 133 of the Evidence Act is against this remark. But, in my opinion, that part of the section, entirely unnecessary, is inserted merely *pro majore cautela*, to bar a probable misinterpretation of the section.) It could not, I submit, be otherwise, since the weight to be attached to any evidence or consideration cannot be the same in any two cases.

The case of *Yasin* v. *King-Emperor* ((1901) I. L. R. 28 Cal. 689) was quoted for the position that a retracted confession should carry no weight as against an accused other than the maker, and that far more corroboration would be *necessary* than in the case of accomplice evidence. This case was not quoted in *Emperor* v. *Kehri* ((1907) I. L. R. 29 All 434), a case of six years later than *Yasin's*, in which a contrary view is taken I have quoted this case above.

In my humble opinion, the law governing these cases is this. Confessions by co-accused may, in any circumstances whatever, be considered. The weight, if any, to be attached to them is a matter wholly dependent on the individual case. Any Court would, at the best, regard them with jealousy and caution: when retracted the degree of jealousy and caution would be higher : when also uncorroborated the degree of jealousy and caution would be at its highest. But if, after consideration on this basis, a Court *believes* such a confession, it can, and must, act on that belief. (Why the words "may take into consideration" are used, instead of "shall be relevant," I do not know. Nor why in sections 25-27 the words "shall be proved" are used instead of "shall be relevant.")

Once these confessions are considered against these accused there is, in my opinion, an end of the matter. I entirely believe the confessions and can see no reason, neither is any suggested, why any one of accused should falsely implicate any other. It was argued in defence that all would naturally implicate accused 1 because he had "split". *But none of them knew this; the* fact was mentioned for the first time in this Court

The accused appealed to the High Court.

The appeal was argued before Heaton and Shah, JJ. on the 18th August 1913.

The Court delivered the following judgments on the 28th August 1913.

HEATON, J. :—In this case eleven persons were tried for dacoity, seven out of the eleven either before a Third Class Magistrate or before the Committing Magistrate

or both confessed to their guilt and implicated the other four. As regards these seven there was other evidence besides their confessions. All eleven were convicted and all have appealed.

As regards the seven who made confessions, I think, the evidence is conclusive.

The only matter which requires serious considerations as regards them is whether to their confessions the provisions of section 24 of the Indian Evidence Act apply, so as to render them irrelevant. The matter was considered by the trying Judge and he came to the conclusion that the confessions were relevant. Accused 1 confessed only to the Committing Magistrate and accused 2 and 5 before the Committing Magistrate confirmed the confessions they had previously made. Before the Committing Magistrate accused 3, 6, 7 and 8 repudiated their confessions and two of them Nos. 6 and 7 produced written statements. These two, therefore, had evidently carefully considered the matter. I infer that the others had done the same. Hence the fact that accused 1, 2 and 5 confessed to the Committing Magistrate is in the circumstances a peculiarly strong reason for holding that the confessions of all were given in a way that did not offend against the provisions of section 24 of the Evidence Act. This inference is confirmed by the manner in which the confessions were recorded and by the assurance of the Magistrate who recorded them that they were voluntarily made.

Against this is the circumstance that the confessing accused were in each instance for three or four days in the custody of the Police before they confessed and that whilst in such custody they produced property alleged to be stolen. How it came about that they were so long in police custody does not appear. Accused 3, 6, 7 and 8 were all defended by three pleaders but no cross-examination of witnesses was directed to this matter

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The Magistrate who recorded the confessions was aware of it: yet he was satisfied that the confessions were voluntary.

I do not find any good reason for rejecting these confessions. They appear to me to be relevant.

I would, therefore, confirm the convictions of accused Nos. 1, 2, 3, 5, 6, 7 and 8.

As regards the other four, questions on which my learned colleague and myself are not agreed have arisen.

Against the other four, there is nothing substantial to show that they took part in the dacoity except the confessions of the other seven. It has been contended first of all that, as was decided in the case of *Queen-Empress* v. *Khandia bin Pandu*[1], the confession of a co-accused is not technically evidence, and that, therefore, a conviction based on the confession of co-accused, whether one or more than one, is illegal. As to this point, so far as my own knowledge goes, the ruling where it asserts that the confession of a co-accused is not evidence, has not in practice been followed. The confession of a co-accused has always within my experience been treated as evidence. The Special Tribunal of three Judges, of which I was a member, which tried the *Nasik Conspiracy case*[2], certainly did treat the confessions of co-accused person as evidence. These confessions were tested as far as possible, and were weighed by such knowledge and experience as we possessed, and we determined whether they had or had not probative force: that is to say, we dealt with them precisely as if they were evidence. Undoubtedly, in my opinion, they fall within the definition of evidence in the Evidence Act; for, *these confessions are documents submitted to* the inspection of the Court. Then section 30 by its own

(1) (1890) 15 Bom 66. (2) (1910) Cases Nos. 2, 3 and 4 (Unrep.).

terms applies only where the confession is proved; that is, it applies only to a confession which has become evidence in the case, and the section provides that it may then be taken into consideration against the person implicated as well as against the person making it. These words, in my judgment, are exactly appropriate to making the confession, which is already evidence in the case, evidence against the person implicated as well as the other accused. There are authorities on the point but the only one I will refer to is *Empress* v. *Ashootosh Chuckerbutty*[1]. In this case the Judges did regard the confession of a co-accused as evidence for reasons which to me are convincing. Therefore it is that I feel bound to decline to follow the ruling in *Khandia's case* and feel that I must treat the confessions of the co-accused as evidence for the purpose of all the accused.

The second point is that even so regarding the confessions, they are evidence of so peculiar a character that to found a conviction on that class of evidence alone is illegal, and for this proposition there is the authority of the Calcutta case already referred to. But to this proposition also I must respectfully demur. There is, I believe, no law whatever prescribing the credibility of evidence. Matters relating to the admission of evidence are matters of law, but the credibility of evidence is a matter left to the knowledge, experience and logic of the Court that has to decide on the evidence. I think that much of the confusion which has arisen, more particularly in the case of accomplice evidence, has arisen out of the fact, that questions of credence and questions of law have not been rigorously kept apart but have been confused together. Moreover I think that if a Court lays down a rule touching the credibility of evidence, it does that which it has no

(1) (1878) 4 Cal 483

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authority to do and which it ought to be against the conscience of the Court to do. How can a Court, however eminent, lawfully say that a Jury in some future case shall not be convinced by some particular class of evidence?

Dealing with cases of the four appellants against whom there is nothing but the confessions of co-accused, the matter in my judgment stands thus. The confessions are admissible in evidence. They are not found by the Sessions Judge to offend against any of the provisions of the Indian Evidence Act, and I do not think they do so offend. I think also that they are substantially true statements and are not the result of police or other tutoring. A careful perusal of the statements themselves convinces me of this. It is perfectly true that you cannot from the statements collectively gather with absolute precision either what the maker of each statement himself did or what each one of the others did. But this, it seems to me, is due to the fact that each of these accused persons told his own story in his own way. I have, therefore, come to the conclusion that we have here the implication of four accused persons from seven different and independent sources. To my mind, as a matter of human knowledge and experience, it is almost inconceivable that seven men should independently falsely accuse the same four persons. If, as I believe to be the case, the seven accused have independently implicated the other four, then I regard the evidence in this case as coming nearer to scientific proof than is to be found in the majority of cases in which persons are convicted.

It has, I am aware, been held, and it is often argued that one accomplice or one co-accused cannot corroborate another. Why this argument is advanced is difficult to understand, when one refers to the comment on ill. (*b*) to section 114 of the Evidence Act. That

comment gives precisely this kind of corroboration as in certain circumstances a sound foundation for belief.

I should, therefore, confirm the convictions of all the eleven accused,. but as my learned colleague is of a different opinion as regards accused Nos. 4, 9, 10 and 11, this case will, as regards them, have to be referred to a third Judge.

SHAH, J. :—In this case eleven persons were jointly tried on a charge of dacoity under section 395 of the Indian Penal Code. All of them have been found guilty by the lower Court.

The present appeal is preferred by accused Nos. 4, 9, 10 and 11.

There can be no doubt in this case that a dacoity was committed at the house of one Aminapa The main question in the appeal is whether the accused Nos. 4, 9, 10 and 11 are proved to have taken part in the dacoity. The case against them rests chiefly upon the confessional statements of co-accused Nos. 1 to 3 and 5 to 8

In addition to these statements the learned Government Pleader has relied upon two circumstances: *viz.*, (1) the production of certain cash by accused No. 4: and (2) the conduct of accused Nos. 9 to 11 in remaining away from the usual quarters for some time. The learned Sessions Judge does not attach much importance to these circumstances. I think that the production of cash, which is not indentified as being part of the loot, does not afford any corroboration of the guilt of accused No. 4. As regards the conduct of accused Nos. 9 to 11, I am unable to attach much weight to it, as by itself it is quite insufficient to afford any material corroboration to the confessional statements of the co-accused. The two accused Nos. 9 and 10 in fact surrendered not long after the warrants were issued. The case against the appellants must rest ultimately on

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the confessions of the co-accused. I agree with the Sessions Judge that "If these four accused persons are to be convicted, the convictions can be based only on the confessions of co-accused considered against them under section 30 of the Evidence Act."

Coming now to these confessions the learned Sessions Judge has declined to follow the ruling of this Court in *Queen-Empress* v. *Khandia bin Pandu*[1] and has given his reasons for adopting the view that if a Judge feels convinced of the truth of the story as contained in the confessions of the co-accused, not only may he consider the statements but he is bound to act upon them even though there may be no evidence outside those statements to corroborate the story in material particulars. I am unable to agree with the Sessions Judge in his view that the decisions of this Court and of all the other High Courts in India, at least Madras and Calcutta High Courts, have put an erroneous interpretation upon section 30 of the Evidence Act. I feel clear that the confessions of co-accused may be taken into consideration under section 30 of the Indian Evidence Act along with other *evidence* in the case: but if there is no evidence in the case outside these statements, a conviction based only upon the confessions of the co-accused is not good in law. The confessions of the co-accused could not be considered at all against the other accused but for the provisions of section 30 of the Indian Evidence Act. These confessional statements are not made on oath and have not been tested by cross-examination. Their evidentiary value is very low. They stand on a much lower footing than the evidence of an accomplice. It is clear, therefore, that obvious considerations of justice require that a Court, before acting upon such statements, should insist upon independent corroboration from

[1] (1890) 15 Bom. 66.

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other evidence in the case in material particulars, particularly as to identity.

It is not a matter of much moment to my mind whether these statements are treated as evidence in the case or are treated as matter which may be taken into consideration under section 30 of the Indian Evidence Act. The substantial distinction which the Courts have insisted upon is that the matter (or evidence) which may be taken into consideration under section 30 of the Evidence Act stands on a different footing from the other *evidence* in the case. No matter which can be taken into consideration only under section 30, if there is no evidence other than such matter, can form the basis of a legal conviction. I understand this to be the effect of the rulings to which I shall presently refer.

The Madras High Court has consistently adopted this view almost ever since the passing of the Evidence Act: See *Proceedings, 24th January 1873*[1]; *Reg.* v. *Ambigara Hulagu*[2]; *Giddigadu* v. *Emperor*[3].

A Full Bench of the Calcutta High Court so far back as 1878 accepted this view in the case of *Empress* v. *Ashootosh Chuckerbutty*[4]. The same conclusion has been expressed in the recent case of *Emperor* v. *Lalit Mohan Chuckerbutty*[5] by Jenkins, C. J., as follows:—

"The language of the section is guarded, and the history of this Act leaves me in no doubt that this section was designedly framed in these terms. While admissions, a word which embraces confessions, are by section 21 *relevant* and may be proved as against the person making them all that section 30 provides is, that the Court *may* take into consideration as against other persons. This distinction of language is significant, and it appears to me that its true effect is, that the Court can only treat a confession as lending assurance to other evidence against a co-accused. Thus to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused

(1) (1873) 7 Mad. H. C. R. App. xv.
(2) (1876) 1 Mad. 163.
(3) (1909) 33 Mad. 46.
(4) (1878) 4 Cal. 483.
(5) (1911) 38 Cal. 559 at p. 588.

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alone would be bad in law. This reading of the section appears to me to gain confirmation from the language of section 5."

The Allahabad High Court also accepted this view in *Empress of India* v. *Bhawani*[1] and *Queen Empress* v. *Nirmal Das*[2]. It was suggested in the course of the argument that the Allahabad High Court has dissented from the view in the case of *Emperor* v. *Kehri*[3]. In this case no reference is made to *Nirmal Das' case*, and, as I read the judgments, I think that the observation of the learned Judges expressing their dissent from the view of law taken in the Calcutta Full Bench case were not necessary for the decision of the case. At any rate, the fact remains that the Allahabad High Court has not definitely dissented from the views accepted by it in *Nirmal Das' case.*

So far as this Court is concerned, it has consistently taken the view which has found favour with the Calcutta and Madras High Courts: See *Reg.* v. *Timava*[4] and *Queen-Empress* v. *Khandia bin Pandu*[5]. So far as I know this Court has never allowed a conviction based entirely upon the confession of co-accused to stand. It is argued by the Government Pleader that the judgment in the *Nasik Conspiracy case* is not consistent with this view. I do not find anything in that judgment which can be said to be in conflict with the rulings of this Court. It shows that the confessions of co-accused were considered against other accused under section 30 either as evidence or matter which may be taken into consideration under the said section. The question whether the confessions of co-accused when taken into consideration under Section 30 could form the basis of a conviction in the absence of other evidence in the case apparently did not arise and was not considered in that case.

(1) (1878) 1 All 664
(2) (1900) 22 All 445
(3) (1907) 29 All. 434.
(4) (1876) Ratanlal's Cr. Cas. 108.
(5) (1890) 15 Bom. 66.

By the decisions of this Court I am bound. I may add, however, that I entirely agree with the decisions, which, broadly speaking, accept the view adopted by this Court. In my opinion they lay down a safe and sound rule that no conviction based only upon matter which can be taken into consideration under section 30 is good in law.

There is one more consideration to which I may advert. It is a significant fact that though by Act III of 1891 a proviso was added to section 30 with a view to get rid of the effect of certain rulings, such as *Reg.* v. *Amrita Govinda*[1] and *Badi* v. *Queen Empress*[2], nothing was done then nor has anything been done thereafter by the Legislature to get rid of the effect of the rulings on this point by adding any proviso to that section or by adding appropriate words to section 133 of the Evidence Act.

I do not consider it necessary to refer to the law relating to the evidence of an accomplice in connection with this point. I may, however, add that ill. (*b*) to section 114 in my opinion refers to the testimony of an accomplice. The other illustrations qualifying ill. (*b*) also have reference to such testimony and have no bearing whatever on the present question relating to the confessions of co-accused to be taken into consideration under section 30.

In this case there being no other evidence tending to the convictions of these appellants and the confessions of the co-accused being insufficient by themselves to justify these convictions, I would allow this appeal.

Assuming for the sake of argument, however, that the confessions of the co-accused may form the basis of a legal conviction, I have to consider whether the confessions of the co-accused in this case corroborate one an-

[1] (1873) 10 Bom. H. C. R. 497. [2] (1884) 7 Mad. 579.

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other in material particulars and prove beyond reasonable doubt that the appellants took part in the dacoity. The confessions to be considered are made by accused No. 1 before the Committing Magistrate, by accused Nos. 2 and 5 before a Third Class Magistrate and adhered to before the Committing Magistrate, and by accused Nos. 3, 6, 7 and 8 before a Third Class Magistrate. The accused Nos. 3, 6, 7 and 8 retracted their confessions before the Committing Magistrate and adhered to their retractations in the Sessions Court. The other accused Nos. 1, 2 and 5 have retracted their confessions in the Sessions Court.

In the first place, as all the confessions are retracted, it is most unsafe to place any reliance on them against the co-accused. Secondly, it is clear in this case that these several accused were not arrested on the spot, and the account, which they give in their respective confessions, is not an account given soon after the occurrence. If the dates on which these several accused were arrested, when they were brought to Islampur, and when all of them except No. 1 were taken to the Third Class Magistrate for having their confessions recorded, be carefully examined, it is clear that there is no guarantee in the present case that all the accused were kept separate and that they gave their accounts independently of one another. From the accounts which they give of the occurrence, and particularly of the persons who took part in the dacoity, I am unable to say that previous concert is highly improbable. None of these confessing co-accused is entitled to any particular consideration on the score of good character. In fact, none of the conditions contemplated in the illustrations qualifying ill. (*b*) to sections 114 is found to exist in the present case.

Further, these statements have not been and cannot be tested by cross-examination and are not made on

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oath. I am unable to agree with the learned Sessions Judge when he says that in this case he has no doubt that any degree of cross-examination would only have confirmed the truth of the confessions. This is an assumption which it is easy to make but difficult to substantiate. I, for my part, am unable to say that cross-examination would have only confirmed the truth of the statements in this particular case

Having regard to all these considerations, I am unable to place any reliance upon the confessions of the co-accused so far as they implicate persons other than those making the confessions. I do not consider it necessary to enter into a detailed consideration of these statements. After considering them carefully I feel clear that they fail to establish beyond reasonable doubt that the present appellants took part in the dacoity.

I am of opinion, therefore, that the convictions and sentences should be set aside and the appellants (*i.e.*, accused Nos. 4, 9, 10 and 11) acquitted.

Owing to this difference of opinion, the appeal was heard by Macleod, J., on the 13th September 1913.

Desai, with *G. S. Rao* and *H. B. Gumaste*, for the appellants:—It is undisputed that the only evidence against the appellants is the confessions made by seven co-accused at the trial. These confessions are no evidence and cannot by themselves support the conviction of the appellants:

I submit, first, that the Sessions Judge was bound by the decision of *Queen-Empress* v. *Khandia bin Pandu*[1]; and he ought accordingly to have acquitted the appellants. Secondly, the confession of a co-accused is no evidence; the Court may take it into consideration; but no conviction can be based on it so long

[1] (1890) 15 Bom. 66.

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as it is uncorroborated. Thirdly, even if the Court treat it as evidence, then regard must be had to the rule of construction laid down in an unbroken series of decisions in this Court that the uncorroborated confession of a co-accused is not enough to warrant the conviction of the accused.

The decision in *Queen-Empress* v. *Khandia bin Pandu*[1] was binding on the Sessions Judge. The appeal should therefore be allowed on this short point, and the appellants should be acquitted.

Secondly, the confession of a co-accused is not evidence as defined in section 3 of the Indian Evidence Act, since the co-accused is not a witness, nor is his confession a documentary evidence. Section 30 also does not make it evidence. It can at most be supplementary evidence, but not evidence by itself. In other words, it is *quasi* evidence, its effect being limited: see *Queen-Empress* v. *Khandia bin Pandu*[1]; *Emperor* v. *Lalit Mohan Chuckerbutty*[2].

Thirdly, the point is concluded by a long series of decisions in every High Court: see *Queen* v. *Chunder Bhuttacharjee*[3]; *Barindra Kumar Ghose* v. *Emperor*[4]; *Reg.* v. *Ambigara Hulagu*[5]; *Giddigadu* v. *Emperor*[6]; *Queen-Empress* v. *Dosa Jiva*[7]; *Queen-Empress* v. *Khandia bin Pandu*[1]; *Reg.* v. *Wasapa*[8]; *Queen-Empress* v. *Bayaji*[9]; *Queen-Empress* v. *Ganapabhat*[10]. The case of *Emperor* v. *Kehri*[11] is against the current; but it appears that the confession there was corroborated.

(1) (1890) 15 Bom. 66.
(2) (1911) 38 Cal. 557 at pp. 587, 588.
(3) (1875) 24 W. R 42 (Cri Rul.).
(4) (1909) 37 Cal. 467 at p. 505
(5) (1876) 1 Mad 163.
(6) (1909) 33 Mad. 46.
(7) (1885) 10 Bom. 231.
(8) (1876) Ratanlal's Cri. Cas. 108.
(9) (1886) Ratanlal's Cri. Cas. 311.
(10) (1889) Ratanlal's Cri. Cas 456.
(11) (1907) 29 All. 434 at p. 441.

Further, the confessions in the present case are all retracted. The retractation may not have any effect against the confessing accused; but as against the co-accused, a retracted confession has no weight at all: see *Yasin* v. *King-Emperor*[1].

Strangman (Advocate General), with *S. S. Patkar*, Government Pleader, for the Crown:—Section 30 of the Indian Evidence Act says that the Court may take the confession of a co-accused into consideration. It can only do so by treating it as evidence. The Evidence Act states first of all, what is evidence. It then proceeds to consider, what is relevant evidence; and it finally addresses itself to the question, what evidence amounts to proof. It provides nowhere for the *quantum* of evidence to be given in any particular case. The confession of co-accused is evidence; and a conviction may be founded on that evidence. see *Emperor* v. *Kehri*[2].

In the present case, seven accused persons have confessed, several of them on more than one occasion. Each of them is corroborated in material particulars by the remaining confessions. They are cumulative. They are believed by the Sessions Judge to be true. They can, therefore, support by themselves the conviction of the appellants.

Desai, in reply.

Cur. adv. vult.

MACLEOD, J.:—In this case eleven persons were tried jointly before the Sessions Judge of Bijapur sitting with Assessors on a charge of dacoity. All were found guilty and sentenced to various terms of imprisonment.

Accused Nos. 4, 9, 10 and 11 preferred an appeal to the High Court which was heard by Heaton and Shah, JJ.

(1) (1901) 28 Cal. 689 at p. 691. (2) (1907) 29 All. 434.

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The learned Judges having differed, the appeal has been referred to me for final decision.

It is admitted that there is nothing on the record which can be said to implicate the appellants in the dacoity, which undoubtedly was committed on the 18th-19th January 1913, except the confessions of the other seven persons who were tried jointly with the appellants. No. 1 confessed before the Committing Magistrate; Nos. 2 and 5 confessed before the Third Class Magistrate and the Committing Magistrate; Nos. 3, 6, 7 and 8 confessed before the Third Class Magistrate but retracted their confessions before the Committing Magistrate. Before the Sessions Judge all the confessions were retracted.

Section 30 of the Evidence Act is as follows :—

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

It seems surprising that this section which has given rise to so much discussion, so much conflict of judicial opinion, as to its real meaning, should have continued to exist without amendment.

The confessions made by the co-accused affecting themselves and the appellants having been proved the Court was entitled to take them into consideration as against the appellants.

It seems to me immaterial whether such a confession is called 'evidence' or 'matter'. If anything that a Court may take into consideration to enable it to come to a conclusion whether the guilt of an accused person is proved, can be called evidence, then the confession is evidence, but that part of it which affects another accused is not evidence as defined by the Act, and the fact that it is included in the Magistrate's record of what

the confessing accused admitted against himself, which is relevant, in my opinion makes no difference.

It has been argued for the appellants that as a matter of law the Court could not convict on these confessions standing by themselves, that the confessions referred to in section 30 must be unretracted confessions, and that in any event the section must be read as if it said that the confessions might only be taken into consideration along with other evidence against the accused.

I do not think that 'confession' in section 30 can be restricted to an unretracted confession, as once a confession is proved it may be taken into consideration. Nor do I think that words can be read into the section when there is nothing in the section to fetter the discretion of the Court, or that there is anything in the section itself which prevents a Court from convicting after taking the confession into consideration.

But I do think that the High Courts in India have, as they are clearly entitled to do, laid down rules of practice which deserve all the reverence of law, so that they ought to be observed by Judges when exercising *their discretion under section 30.*

It was decided in this Court in *Queen-Empress* v. *Khandia bin Pandu*[1] that a conviction founded solely on the confessions of co-accused could not be sustained. My brother Heaton has declined to follow that decision because the *ratio decidendi* was that the confessions of the co-accused were not technically evidence within the definition of section 3 of the Act, and this Court has since then repeatedly held that such confessions were evidence. But as I have already stated, if these confessions can be called evidence, it can only be by using the word 'evidence' in a wider sense as meaning 'any matter which the Court may take into consideration.'

[1] (1890) 15 Bom. 66.

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The confessions made by the co-accused affecting themselves and the appellants having been proved the Court was entitled to take them into consideration as against the appellants.

It seems to me immaterial whether such a confession is called 'evidence' or 'matter'. If anything that a Court may take into consideration to enable it to come to a conclusion whether the guilt of an accused person is proved, can be called evidence, then the confession is evidence, but that part of it which affects another accused is not evidence as defined by the Act, and the fact that it is included in the Magistrate's record of what

that it ought not to convict however many of the co-accused have confessed. I agree with my brother Shah that the conviction and sentence should be set aside and the appellants acquitted.

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Rs. 240 taken from accused 4 to be returned to him.

Appeal allowed.

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APPELLATE CIVIL.

Before Mr Justice Heaton and Mr Justice Shah

DINKAR HARI KULKARNI (ORIGINAL DEFENDANT), APPELLANT, v. CHHAGANLAL NARSIDAS AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1913. September 16.

Limitation Act (IX of 1908) Articles 116 and 66, section 19—Registered bond—Suit to recover money due on the bond—Period of limitation—Acknowledgment contained in promissory notes

On the 17th June 1897, the defendant passed a registered mortgage bond in favour of the plaintiff It was attested by one witness and made the mortgage amount repayable in three instalments, the last one becoming due on the 24th June 1900 On the 24th August 1903, the defendant passed a promissory note in favour of the plaintiff, wherein he stated . "An account is taken to-day and the amount due under the mortgage deed is set apart." Again, on the 11th August 1905, he passed another promissory note which recited "Besides this the mortgage debt is distinct." The plaintiff sued on the 6th August 1910 to recover the money due under the bond :

Held, that the words used in the two promissory notes amounted to acknowledgments within the meaning of section 19 of the Limitation Act.

Held, further, that the suit was governed by Article 116 and not by Article 66 of the Limitation Act, for though the suit was in form a suit for money due on a bond, it was in substance a suit for compensation for breach of a contract.

Ramdin v. *Kalka Pershad*[1] and *Bulakhi Ganu Shet* v. *Tukarambhat*[2], commented on.

* First Appeal No. 206 of 1912.

[1] (1884) L. R. 12 I. A. 12. [2] (1889) 14 Bom. 377.

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APPEAL from the decision of N. B. Mujumdar, Additional First Class Subordinate Judge at Dhulia.

Suit to recover money.

The defendant executed a registered mortgage bond in favour of the plaintiff on the 17th June 1897. It contained a personal covenant. It was attested by one witness. The sum advanced was repayable in three instalments which became due respectively on the 5th June 1898, the 24th June 1899 and the 14th June 1900. The instalments were not paid. On the 24th August 1903, the defendant passed a promissory note to the plaintiff, wherein he stated: "An account is taken to-day and the amount due under the mortgage deed is set apart." On the 11th August 1906, he passed another promissory note which recited: "Besides this, the mortgage debt is distinct."

On the 6th August 1910, the plaintiff filed the present suit to recover the money due under the registered bond.

The Subordinate Judge held that the registered bond not having been attested by two witnesses could operate only as a simple bond, that the two promissory notes were acknowledgments within the meaning of section 19 of the Limitation Act, and that the suit was governed by Article 116 of the Limitation Act. He, therefore, decreed the plaintiff's suit.

The defendant appealed to the High Court.

Gadgil, with *A. V. Lele*, for the appellant:—The case is governed not by Article 116 but by Article 66 of the Limitation Act. See *Ramdin* v. *Kalka Pershad*[1] and *Bulakhi Ganu Shet* v. *Tukarambhat*[2]. Article 116 applies only when the suit for compensation for breach of contract in writing registered, that is, to suits contem-

[1] (1884) L. R. 12 I. A. 12. [2] (1889) 14 Bom. 377.

plated by section 73 of the Indian Contract Act. See *P. R. & Co.* v. *Bhagwandas*[1].

The promissory notes are not acknowledgments within the meaning of section 19 of the Limitation Act.

W. B. Pradhan, for the respondents :—Article 116 governs all suits brought on registered writings. The article applies to suits to recover money on registered bonds. See *Ganesh Krishn* v. *Madhavrav Ravji*[2]; *Husain Ali Khan* v. *Hafiz Ali Khan*[3]; *Srinivasa* v. *Rengasami Aiyangar*[4]; *Sawaba Khandapa* v. *Abaji Jotirav*[5]; *Gomaji* v. *Subbarayappa*[6]; *Din Doyal Singh* v. *Gopal Sarun Narain Singh*[7].

[SHAH, J.: referred to *Kameswar Pershad* v. *Rajkumari Ruttun Koer*[8].]

Gadgil, in reply.

SHAH, J. —The present appeal arises out of a suit brought by the plaintiffs to recover money by sale of the mortgaged property described in the plaint and in the alternative, in case a decree for sale of the property cannot be passed, for a decree personally against the defendant. The bond is dated the 17th of June 1897 under which the defendant agreed to pay the amount of the mortgage debt in three instalments, the first instalment being payable on the 5th June 1898, the 2nd on the 24th June 1899, and the 3rd on the 14th June 1900. The plaintiff relied also upon two acknowledgments contained in two promissory notes, dated the 24th August 1903 and 11th August 1906 respectively. The suit was filed on the 6th August 1910. The bond being attested only by one witness is inoperative as a mortgage bond. The lower Court has, however, passed a decree against

(1) (1909) 34 Bom 192.
(2) (1881) 6 Bom. 75.
(3) (1881) 3 All. 600.
(4) (1908) 31 Mad. 452.
(5) (1887) 11 Bom. 475.
(6) (1891) 15 Mad 253
(7) (1891) 18 Cal. 506.
(8) (1892) L. R. 19 I. A. 234.

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the defendant personally, holding that the plaintiffs' claim is within time.

In appeal it has been contended on behalf of the appellant before us that though the bond sued on is registered, the claim is beyond time inasmuch as Article 66 and not Article 116 of the Limitation Act, Schedule I, is applicable, and that the acknowledgments which have been held by the lower Court to be good acknowledgments are really not acknowledgments within the meaning of section 19 of the Limitation Act. It is also urged that the personal decree cannot be legally passed.

With regard to the first point, reliance has been placed upon two cases, *viz.*, *Ramdin* v. *Kalka Pershad*[1] and *Bulakhi Ganu Shet* v. *Tukarambhat*[2]. On the strength of certain observations in these two cases, it has been urged that where the suit is in form a suit on a bond, Article 66 should be applied, and not Article 116, even though the bond may be registered. Several other cases have been cited at the bar having reference to this particular point, and on a consideration of all the cases and the observations in the above two cases, I have come to the conclusion that the current of decisions, which is against the appellant's contention, is in no way disturbed by the observations relied upon by him. It has been held by all the High Courts in India that though the suit may be in form a suit for money due on a bond, still it is in substance a suit for compensation for breach of a contract within the meaning of Article 116 of the Limitation Act, and the period of six years provided in that article would apply if the bond is registered. I need refer only to the cases of *Ganesh Krishn* v. *Madhavrav Ravji*[3], *Amritrav Vinayak* v. *Vasudev*[4], *Husain Ali Khan* v. *Hafiz Ali Khan*[5],

(1) (1884) I. R. 12 I. A. 12

(2) (1889) 14 Bom. 377

(3) (1881) 6 Bom. 75.

(4) (1882) P. J. p. 291.

(5) (1881) 3 All. 600.

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Naubat Singh v. *Indar Singh*[1], *Umesh Chunder* v. *Adarmoni Dasi*[2], *Din Doyal Singh* v. *Gopal Sarun Narain Singh*[3] and *Srinivasa Raghava Dikshadar* v. *Rengasami Aiyangar*[4]. It will thus appear that the Courts have consistently taken the same view both before and after the ruling in *Ramdin* v. *Kalka Pershad*[5]. This view derives further support from the observations of the Judicial Committee in the case of *Kameswar Pershad* v. *Rajkumari Ruttun Koer*[6], where, in a suit based upon a registered instrument, it was observed that the period of six years, and not a period of twelve years, would apply to the case. With regard to the observations in the case of *Ramdin* v. *Kalka Pershad*[5], I may say that, having regard to the facts of that case, the only point which arose for decision was whether for the purposes of personal liability the period of twelve years under Article 132 of the Limitation Act applied to the case. There was no point in that case as to whether the period of limitation applicable would be three years or six years. Therefore, the observations in the case of *Ramdin* v. *Kalka Pershad*[5] about the shorter period of three years being applicable were not necessary for deciding the appeal. As the observations in the case of *Kameswar Pershad* v. *Rajkumari Ruttun Koer*[6] are in consonance with the current of decisions of the Indian Courts and in conflict with the *dictum* in the case of *Ramdin* v. *Kalka Pershad*[5], I think that it would be proper to accept the view which has found favour with the Indian Courts. As regards the case of *Bulakhi Ganu Shet* v. *Tukarambhat*[7], having regard to the facts of the case, it is clear that it was not necessary to decide whether the period of limitation

(1) (1890) 13 All 200
(2) (1887) 15 Cal 221
(3) (1891) 18 Cal 506
(4) (1908) 31 Mad 452
(5) (1884) L. R. 12 I. A. 12
(6) (1892) L. R. 19 I. A. 234
(7) (1889) 14 Bom. 377

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applicable was three years or six years. The observations of the learned Judges are based upon the *dictum* in the case of *Ramdin* v. *Kalka Pershad*[1] and upon two cases which on reference I find to have no bearing on the question as to whether to a suit on a registered bond Article 66 or Article 116 would apply. I think, therefore, that the lower Court has rightly applied Article 116 to the present case.

As regards the argument as to acknowledgments, I am of opinion that the words used in the two promissory notes do amount to acknowledgments within the meaning of section 19 of the Limitation Act. I am unable to see why a personal decree cannot be passed. The only consideration urged by the learned counsel for the appellant is that as the bond provides that the executant is to pay the balance personally after the proceeds of the sale should be credited to accounts, and that as no sale can be effected under the bond there is no liability whatever. The words in the bond, however, "as stated above I shall repay the amount with interest" contain a distinct undertaking to pay, and the effect of these words is in no way limited by the subsequent undertaking to pay the balance in case of deficiency.

I, therefore, affirm the decree of the lower Court with costs.

HEATON, J. :—I concur.

Decree confirmed.

R. R.

[1] (1884) L. R. 12 I. A. 12

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Macleod

BHATT DAHYABHAI MOTIRAM AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v PANDYA CHUNILAL KESHORDAS AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1913. September 23.

Mahomedan Law—Right of pre-emption—Litigation between Hindus—Adoption of pre-emption as usage—Burden of proof—Ancient and invariable custom—Pre-emption, a personal right not descendible to heirs—A custom cannot be proved by the admission of parties or their counsel.

In litigation between Hindus where one party alleges the adoption of a whole branch of the Mahomedan Law such as that of pre-emption, and the other party repudiates the application of the foreign law, it lies very heavily on the party alleging to prove that that law has been adopted as a usage and could be proved to have been so adopted by proof of ancient and invariable custom. Such a party must stand or fall by the strict Mahomedan Law of pre-emption.

Generally speaking the right of pre-emption is a personal right which, under the Mahomedan Law, would not descend to heirs.

Per MACLEOD J.—A custom must be proved by evidence in the first instance and once it is proved the Courts are entitled to recognize its existence. *A custom cannot be proved by the admission of the parties or their counsel before the Court.*

SECOND appeal against the decision of C. N. Mehta, Joint Judge of Ahmedabad, reversing the decree of M. G. Mehta, Subordinate Judge of Borsad.

The plaintiffs sued to obtain a decree for pre-emption in respect of an *ordi* in the town of Borsad against defendants 1 and 2, the vendors, and defendant 3, the vendee under a registered deed of sale dated the 1st July 1908.

The defendants answered *inter alia* that the suit was not maintainable under the law of pre-emption because the grounds on which the right was claimed to have originated were not true and that the parties were Hindus and there was no custom in that part of Gujarat

* Second Appeal No. 106 of 1913.

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where they lived to apply the law of pre-emption to Hindus.

The Subordinate Judge found that the plaintiffs had the right to bring the suit in spite of the fact that the father of plaintiff 1, grandfather of plaintiff 2 and husband of plaintiff 3 had brought a similar suit in respect of the very right, namely, suit No. 660 of 1908, which abated on his death on the 28th January 1909, his heirs, plaintiffs 1 and 2 being disallowed to continue the suit on the ground that the right of pre-emption was, under the Mahomedan Law, *personal*, that defendant 3 had, however, a preferential right to pre-empt the house to that of the plaintiffs and that in any case, as in the second ceremony (*talab-i-ishhad*=invocation to witnesses) reference was not made to the fact of the first immediate demand (*talab-i-mowasibat*) having been previously made, the defect was fatal to the plaintiffs' claim under the Mahomedan Law. He, therefore, dismissed the suit. The Subordinate Judge in his judgment observed :—

Lastly comes the point taken in the written statement about there being no custom of pre-emption amongst Hindus in this District. No issue was asked for. But it is said it was the duty of the Court to raise the issue, arise as it did out of the pleadings, of its own *motion* I believe that all concerned did *not* feel its necessity in deference to the judicial recognition of the custom in 6 Bom H C. R noticed since as prevalent throughout Gujarat in all the standard text-books It is true that the ruling quoted was apparently an instance of over-generalization that the only cases where the right was allowed came from Surat and Broach, which do not constitute the whole of Gujarat; that here in these parts, it is known to be a recent innovation not only from all reliable sources of information but from the absence of any single reported case; that if the question comes to be considered, as a matter of principle and policy, the opinions of learned authors and Judges as to the inherent evils of the right (*vide* I. L. R. 1 All 207 at pp 208—209 and MacNaghten's preface, p XVII, 5th edition 1882) and its tendency to depreciate the value of property will have to be respectfully dealt with I do not think this Court is at liberty to regard the point as still open

On appeal by the plaintiffs the Judge reversed the decree and allowed the plaintiffs' claim.

The defendants preferred a second appeal.

G. K. Parekh for the appellants (defendants).

Weldon, with *G. S. Mulgaonkar*, for the respondents (plaintiffs).

BEAMAN, J. :—In this suit the plaintiffs sue to enforce an alleged right of pre-emption in respect of certain property in the town of Borsad, zilla Kaira. All parties to the suit are Hindus. The written statement resting on this fact alleged that there was no local custom authorizing the application of the Mahomedan Law of Shaffa or pre-emption. Doubtless that passage, if correctly quoted from the written statement by the learned trial Judge was not very happily worded, as he at least appears to have thought that had he raised an issue, the onus of proof would have lain upon the defendants. I am very clearly of opinion that in litigation between Hindus where one party alleges the adoption of a whole branch of the Mahomedan Law, such as that of pre-emption, and the other party repudiates the application of the foreign law, it lies very heavily on the party alleging to prove that that law has been adopted as a usage and could be proved to have been so adopted by proof of ancient and invariable custom.

In this case the learned trial Judge merely mentioned the point at the conclusion of his judgment but it is clear that the defendants' pleader must have made use of it in his final address, and I am of opinion that the pleader was right when he said that in the state of the pleadings, it was the learned trial Judge's duty to have raised the issue of custom upon which alone the plaintiffs could have succeeded in this suit and have thrown the burden of proving it upon them. This was not done because it appears to be generally accepted that the Mahomedan

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Law of pre-emption has been adopted as part of the customary law and usage of the Hindus of Gujarat generally. This notion which certainly is widely spread throughout the whole legal profession, appears to me to rest upon no solid foundation whatever. It is traceable in this Court to the case of *Gordhandas Girdharbhai* v. *Prankor*[1], decided by Gibbs and Melvill, JJ. The facts in that case appear to have been that the trial Court took evidence of the alleged custom and found as a fact that it was not established. But their Lordships in appeal overruled that finding relying apparently upon numerous decisions to the contrary in the Suddar Ȧdawlats of Broach and Surat. That is to say that the decision rests not upon any proof of custom in the particular case but on the supposed proof of that custom in other cases decided in other Courts. The learned Judges gave as a case in point (taken I suppose from the numerous cases which they believe to have been decided in the Saddar Adawlats of Broach and Surat) the case of *Narun Nursuee* v. *Premchund Wullubh*[2], decided by Forbes and Newton, JJ. That case came from Surat and the trial Judge without apparently having taken any evidence whatever of the alleged custom, expressed his opinion that the custom was formally established at any rate in the town of Surat. The appeal Court did not find any such custom proved and taking a short cut to their decision said in effect that if the parties really had been governed by such a custom drawn from the Mahomedan Law, the necessary requirements of that law had not been complied with, while if they were not governed by any such special custom, then they had no right of pre-emption under the Hindu Law and so dismissed the claim. Now that is the sole foundation in the case law for this extraordinarily large doctrine, which, as I say, disseminated chiefly by tradition, I think, passing

[1] (1869) 6 Bom. H. C. R. (A. C. J.) 263. [2] (1862) 9 Harrington 591.

from lip to lip in the profession and confirmed by commentaries and text books is that the complete and highly technical Mahomedan Law of pre-emption has been adopted not only in the towns of Surat and Broach but by every Hindu inhabitant of Gujarat It will be observed that even admitting the correctness of the views expressed by the learned Judges in *Gordhandas Gurdharbhai* v. *Prankor*(1), their decision goes no further than the territorial jurisdiction of the Sudder Adawlats of Surat and Broach. We are not in a position to consider any other cases decided in those Adawlats which are merely collectively referred to by the learned Judges but if the single case they do cite is typical of the rest, it supports my view that the foundation of this doctrine is, to say the least, extremely narrow and extremely insecure. Gujarat contains other districts than Surat and Broach and the population of those districts, particularly Kaira and Panch Mahals, is of an essentially different character from the population of the towns at any rate of Surat and Broach. Between the decision of 1869 which I have just referred to and the decision in *Rewa* v. *Dulabhdas*(2) in the year 1902 (Batty and Aston, JJ.), I have been unable to discover a single authority in this Court which supports the view expressed by the learned trial Judge and evidently approved by the learned Judge in appeal. In this case I think it is very necessary to express my most emphatic disapproval of such methods of extending Customary law The particular law which is thus sought to be made applicable to the entire population of a Province is a law which the Courts, I think, would only so extend with the very greatest reluctance and on compulsion after being satisfied in proper cases and upon proper evidence that that law had been adopted from time immemorial and had been invariably and consistently acted upon from time

(1) (1869) 6 Bom. H. C. R. (A. C. J.) 263. (2) (1902) 4 Bom. L. R. 811.

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immemorial to the present day to those Hindus of Gujarat who are now upon mere assumption said to have incorporated it in their own Hindu Law with which it has absolutely no affinity in any point. In all future cases I hope that where a custom of this kind is alleged as the foundation of a claim and is denied by the defendant, the trial Judge will insist upon strict proof of it and will not be misled by the very general dicta to be found in the two cases of *Gordhandas Girdharbhai* v. *Prankor*[1] and *Rewa* v. *Dulabhdas*[2] to which I have just referred.

The learned counsel for the plaintiffs has suggested that if this Court takes that view of the custom, or rather I should say of the manner in which the alleged custom has virtually been presumed to exist in the present case, it would be desirable to frame two issues, namely, whether the plaintiffs proved the custom upon which they rely and second, whether, if so, the plaintiffs have conformed to all the requirements of the Mahomedan Law of pre-emption in the particular case, and remand those two issues to the Court below. I should have been only too willing to do so particularly in order to ascertain whether, upon a proper trial, any evidence whatever would be forthcoming in support of the alleged custom but I felt that it would be merely wasting the moneys of the plaintiffs in this case for the sake of establishing a general principle, because even assuming that they did succeed in establishing the custom they alleged, it appears to me too clear to admit of argument that they would still be bound to fail in this litigation. The plaintiffs cannot have it both ways. They must either accept the Hindu Law or the Mahomedan Law. Under the Hindu Law, it is admitted that they have no right of pre-emption whatever. Therefore they must stand or fall (I am now assuming that their alleged custom is

(1) (1869) 6 B. H. C. R. (A. C. J.) 263. (2) (1902) 4 Bom. L. R. 811.

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proved) by the strict Mahomedan Law of pre-emption and in my opinion they must fail. Their father Kishordas originally brought a suit for pre-emption in respect of this property. He was one at least of the persons entitled to pre-empt, whether the other plaintiffs were entitled to pre-empt or not would depend not so much, I think, upon their relation to each other as members of a joint Hindu family as upon their being properly classifiable under the Mahomedan Law as those entitled to pre-empt. But either they were or were not entitled, and if they were, it is clear that under the Mahomedan Law each of them was bound to make his claim the moment he knew of the intended sale to the defendant. It is found by the Courts below—indeed it was admitted before the learned Judge of appeal—that none of the present plaintiffs attempted to enforce his right, whatever that might have been under the Mahomedan Law to pre-empt when first the sale to the defendant became known. The only member of the family who did attempt to enforce that right was Kishordas. During the pendency of Kishordas' suit he died. None of the plaintiffs in this suit were made co-plaintiffs with him in that suit. On his death they applied to be entered as plaintiffs in his stead and so to be allowed to carry on that litigation. Generally speaking the right of pre-emption is a personal right which, under the Mahomedan Law, would not descend to heirs. The Courts, therefore, refused to allow any of the present plaintiffs to continue the suit instituted by Kishordas and that suit abated. Then on the very last day of the period of limitation allowed to them the plaintiffs filed this suit in their own right to enforce their own claim to pre-emption. But it is perfectly plain that under the Mahomedan Law that claim could not, so advanced, be sustained. They had known for more than a year of the sale to the defendants and not one of them had gone through any of the requisite formalities of the Mahomedan Law of pre-

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emption. In such circumstances any suit which they brought strictly under Mahomedan Law would be clearly predestined to failure. They seek to evade this by a blending of the Hindu with the Mahomedan Law and the Courts below have acceded to their contentions in this respect. I am however very clearly of opinion that the learned Judge of Appeal was entirely wrong in thus giving effect in a pre-emption suit to the doctrine of representation by a manager peculiar to the Hindu Law. In my opinion, therefore, no useful purpose can be served by remanding the issues suggested by Mr. Weldon for trial upon evidence by the Courts below. I entertain no doubt whatever in my own mind as to what the decision in this case ought to be, and I would, therefore, now dismiss the plaintiffs' suit with all costs upon them.

MACLEOD, J. :—I entirely concur. A custom must be proved by evidence in the first instance and once it is proved the Courts are entitled to recognise its existence. A custom cannot be proved by the admission of the parties or their counsel before the Court. I concur that the appeal should be allowed with costs throughout.

Suit dismissed. Appeal allowed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt. Chief Justice, and Mr. Justice Batchelor.

1913 *September 26.*

HARI BALU GAEKAWAD AND OTHERS (ORIGINAL DEFENDANTS), APPLICANTS, v. GANPATRAO LAKHURJIRAO GAEKAWAD AND OTHERS (ORIGINAL PLAINTIFFS), OPPONENTS.*

Provincial Small Cause Courts Act (IX of 1887), sections 23 and 25—Small Cause suit—Question of title—Suit transferred to the ordinary jurisdiction of the Court—No substantial irregularity—Decision on title—Decree not final—Appeal.

* Application No. 142 of 1913 under the extraordinary jurisdiction.

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In a suit which was originally filed as a Small Cause Court suit in the Court of the Subordinate Judge having both Small Cause and regular jurisdiction, the Judge transferred the suit, at a very early stage, to his file as ordinary Judge as the relief claimed by the plaintiffs depended upon proof or disproof of a title to immoveable property. The Judge then passed a decree deciding the question of title.

Held, that there was no substantial irregularity in thus effecting the transfer and that it must be taken that the powers conferred by section 23 of the Provincial Small Cause Courts Act (IX of 1887) were put in force in a regular manner.

Held, also, that as it was a decree which could not be passed by a Court of Small Causes, it was not a decree falling within the terms of section 27 of the Provincial Small Cause Courts Act (IX of 1887) and was therefore, not final but appealable.

APPLICATION under the extraordinary jurisdiction, (section 115 of the Civil Procedure Code, Act V of 1908) against the decree of V. G. Kaduskar, First Class Subordinate Judge of Ratnagiri, with appellate powers, reversing the decree of S. A. Naik, Subordinate Judge of Dapoli.

The plaintiffs sued the defendants for the recovery of Rs. 5-8-0 as damages caused by their removal of bamboos, mangoes and jack fruits from trees standing on the land in suit which belonged to plaintiffs and which had been in their possession for many years.

The defendants answered that the land in suit did not belong to the plaintiffs and was never in their possession. It belonged to the defendants and was in their possession for a long time.

The suit was originally filed in the Small Cause jurisdiction of the Court but as the Court was also invested with regular jurisdiction, the Judge transferred the suit from his Small Cause jurisdiction to his regular jurisdiction as the right of the plaintiffs and the relief claimed by them depended upon proof or disproof of the title to the land in suit. Having thus transferred the suit from the Small Cause to the ordinary jurisdic-

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tion, the Subordinate Judge found that the plaintiffs' ownership of the land was not proved and he dismissed the suit.

On appeal by the plaintiffs the Appellate Judge found that the decree of the first Court was appealable and that the plaintiffs had proved their title to the plot in suit. He, therefore, reversed the decree of the first Court and awarded to the plaintiffs Rs. 2 as damages.

The defendants preferred an application under the extraordinary jurisdiction, (section 115 of the Civil Procedure Code, Act V of 1908), urging *inter alia* that the Appellate Court had no jurisdiction to entertain the appeal. A *rule nisi* having been issued requiring the plaintiffs to show cause why the decree of the lower Court should not be set aside,

B. V. Vidwans appeared for the applicants (defendants) in support of the rule.

P. V. Kane appeared for the opponents (plaintiffs) to show cause.

SCOTT, C. J. :—The only question in this case is whether the lower appellate Court rightly entertained the appeal. The suit was originally filed as a Small Cause Court suit in the Court of a Judge having both Small Cause Court and regular jurisdiction. Finding that the right of the plaintiff and the relief claimed by him depended upon proof or disproof of a title to immoveable property which the Small Cause Court could not finally determine, the Judge acting under the power contained in section 23 of the Provincial Small Cause Courts Act caused the suit to be transferred to his file as an ordinary Judge at a very early stage after the plaintiff had been examined. There was no substantial irregularity in this. He could hardly return the plaint to be presented to another Judge, because he himself was the Judge having jurisdiction

to determine the question of title; and no point is made of the fact that the evidence of the plaintiff recorded before him as a Small Cause Court Judge was used in the regular suit. We think that it must be taken that the powers conferred by section 23 were put in force in a regular manner. He then passed a decree deciding the question of title. It was a decree which could not be passed by a Court of Small Causes; it was not a decree falling within the terms of section 27 of the Small Cause Courts Act, and was therefore, not final. It was, therefore, appealable and the lower appellate Court rightly entertained the appeal. In support of the argument that the decree was not appealable reference has been made to *Kali Krishna Tagore* v. *Izzatannissa Khatun*(1). In that case the question was whether a suit was cognizable by a Court of Small Causes within the meaning of section 586 of the old Code of Civil Procedure so as to bar a second appeal, and the learned Judges came to the conclusion that the suit, although it might fall within the class of suits contemplated by section 23, would nevertheless be a suit cognizable by a Court of Small Causes. That, however, is not the point before us. The question is whether the decree, which was actually passed by a Court to which the suit originally so cognizable was transferred, was a final decree under the Small Cause Courts Act. For the reasons above stated we are of opinion that it was not. Therefore, we cannot interfere under our extraordinary jurisdiction. We discharge the Rule with costs.

Rule discharged.

G. B. R.

(1) (1897) 24 Cal 557

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1913. *September 29.*

HARI GOVIND KALKUNDRI (ORIGINAL PLAINTIFF), APPELLANT, *v.* NARSINGRAO KONHERRAO DESHPANDE, BY THE COURT OF WARDS, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.[*]

Civil Procedure Code (Act V of 1908), Order XXI, Rule 7 (corresponding to Act XIV of 1882, section 225)—Court of Wards Act (Bom. Act I of 1905), sections 31 and 32—Executing Court, power of—Jurisdiction of the Court which passed the decree under execution—Section 32 of the Court of Wards Act (Bom. Act I of 1905) not retrospective.

Under Order XXI, Rule 7 of the Civil Procedure Code (Act V of 1908) the executing Court has no power to question the jurisdiction of the Court which passed the decree under execution.

Section 32 of the Court of Wards Act (Bom. Act I of 1905) was not intended to apply to pending suits. In terms it refers to suits "brought by or against" a Government ward. Section 32 must be read with section 31 which provides that before such a suit is brought notice shall be delivered to, or left at the office of the Court of Wards. Thus section 32 does not apply to suits pending at the time of the assumption of superintendence of the ward's estate by the Court of Wards.

FIRST appeal against the decree passed by L. C. Crump, District Judge of Belgaum, in a darkhast for execution of a decree.

The plaintiffs brought a suit against the defendants in the Court of the Joint Subordinate Judge of Belgaum for the recovery of Rs. 950 due to them under a bond dated the 22nd September 1891. On the 27th May 1907, the Subordinate Judge passed a decree for the recovery of the amount from defendant 1 personally and from the joint property of defendants 1 and 2.

Subsequently the plaintiffs having presented a darkhast to the District Judge against the defendants'

[*] First Appeal No. 105 of 1913

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property which had passed under the control of the Collector of Belgaum as the Court of Wards, the District Judge dismissed the darkhast on the ground that under the provisions of the Court of Wards Act (I of 1905) the decree was a nullity and incapable of execution.

The plaintiffs preferred an appeal.

S. R. Bakhle, for the appellants (plaintiffs):—This is an application for the execution of a decree in a suit brought against the defendants before they were made the wards of Court. The suit was brought in 1906. On the 13th May 1907 Government passed a Resolution, No. 2098, notifying that the Court of Wards would take up the management of the estate of the defendants on the 15th May 1907. These facts were brought to the notice of the Subordinate Judge before whom the suit was pending and he was requested to make the Court of Wards a party, but he declined to do so on the ground that "the section had no retrospective effect". The decree was passed on the 29th May 1907 against defendant 1 personally and against the joint estate of defendants 1 and 2. On the 5th June 1907, a notification under section 13 of the Court of Wards Act was issued calling upon persons having claims against the Government wards or their property to appear. The claim of the plaintiffs was accordingly submitted to the Court of Wards under section 15 of the Act, and after investigation the Court of Wards issued a certificate under section 17 of the Act and this certificate was filed with the darkhast for execution. The lower Court held that under section 32 of the Court of Wards Act, it was obligatory on the Court to make the Court of Wards a party to the suit and that as the decree was passed without the Court of Wards being on the record, it was a nullity. The District Judge had the matter before him as an executing Court and it has been held that such Court

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has no jurisdiction to go into the question of the validity of the decree: *Chintaman Vithoba* v. *Chintaman Bajaji*[1].

Next we contend that the District Judge was wrong in holding that section 32 of the Court of Wards Act was applicable to the facts of the present case. Section 32 is to be read with section 31 of the Act and they both refer to suits brought after the application of the Act. They do not apply to pending suits. The Court of Wards is cognizant of pending suits and has made provision about them in appropriate terms. Section 15 refers to pending suits and section 17 refers to proceedings in execution being "instituted or continued". If section 32 had been intended to apply to pending suits, the Legislature would have used similar words. We contend, therefore, that the view of the Subordinate Judge, who tried the suit and passed the decree, was correct.

We took all the steps necessary under the Court of Wards Act and obtained a certificate under section 17 by which it would appear that the Court of Wards had adjudicated the claim and recognized the decretal debt as a just debt. The District Judge should have, therefore, allowed the execution to proceed.

N. A. Shiveshwarkar for the respondents (defendants represented by the Court of Wards):—

[SCOTT, C. J.:—What *locus standi* have you?]

We are brought on the record by the plaintiffs as the person in possession of the estate against which the decree has been passed.

We contend that the question of the validity of the decree can be raised before the executing Court: *Imdad Ali* v. *Jagan Lal*[2]. The Court has to be satisfied

[1] (1896) 22 Bom. 475. [2] (1895) 17 All. 478 at p. 482.

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that the decree is good before it executes it: *Haji Musa Haji Ahmed* v. *Purmanand Nursey*[1].

If the defendants are minors, the Court cannot pass a decree unless the minors are properly represented before the Court. The Court of Wards Act puts the wards also under a disability, similar to that suffered by minors and lunatics. Consequently a decree obtained against a ward when he is not properly represented by the Court of Wards would be a nullity. Proceedings before the Court prior to the decree without a proper representation would be unauthorized.

[BATCHELOR, J.:—There is nothing beyond section 32 to make the proceeding bad.]

That would be so. If the Legislature wanted to exclude pending suits, it would have done so in express terms. The Legislature was aware of pending proceedings since it refers to them in section 17. The fact of the certificate being granted does not make any difference.

The certificate merely certifies that there is a claim. It cannot make a decree good if it is bad. The Court has to consider if there was inherent defect of jurisdiction in passing the decree.

[SCOTT, C. J.:—The Civil Procedure Code of 1908 has made a change in section 225 of the Code of 1882 by omitting the words "or of the jurisdiction of the Court which passed it". Therefore the *ratio* of the decision in *Haji Musa Haji Ahmed* v. *Purmanand Nursey*[1] no longer exists.]

We object to the darkhast for execution being presented to the District Judge. The decree was passed by the Court of the Joint Subordinate Judge of Bel-

(1) (1890) 15 Bom. 216.

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gaum and under section 34 of the Civil Courts Act the darkhast ought to have been made to that Court.

Bakhle in reply:—The darkhast was filed in the District Court as that Court alone has the jurisdiction to entertain matters before the Court of Wards. The objection of presentation in the wrong Court was not raised in the lower Court under the present Code of 1908. Therefore it cannot be allowed to be raised now. It must be taken to have been waived.

SCOTT, C. J.:—*This is an appeal against an order of* the District Judge of Belgaum dismissing an application for execution of a decree which had been passed *by the Joint Subordinate Judge at Belgaum in* suit No. 246 of 1906. The decree was against defendant 1 personally and against the joint estate of defendants 1 and 2. It has not been made clear to us why the application for execution was not made to, or entertained by, the Court which passed the decree. But we will assume that the application was rightly made to the District Court. The learned District Judge dismissed the application on the ground that the decree was a nullity and incapable of execution. There are cases which were decided under the Code of 1882 in which the opinion was expressed that it is open for an executing Court to consider whether the decree sent to it for execution was passed by a Court having jurisdiction to pass it. The dictum to that effect in the Bombay Reports is to be found in *Haji Musa Haji Ahmed* v. *Purmanand Nursey*[1] and it was accepted in *Imdad Ali* v. *Jagan Lal*[2]. The ratio of the dictum in *Haji Musa Haji Ahmed* v. *Purmanand Nursey*[1] was that the Code recognizes in section 225 the right of the executing Court to enquire into the jurisdiction of the Court which passed the decree. That section, however,

(1) (1890) 15 Bom 216.

(2) (1895) 17 All. 478

has been altered in the Code of 1908, for the words: "or of the jurisdiction of the Court which passed it," have been omitted in Order XXI, Rule 7, and we think that the inference is clear that the executing Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution. We are, therefore, of opinion that the learned District Judge acted *ultra vires* in deciding that the decree which he was called upon to execute was a nullity. We further disagree with him in the reasons which he assigned for holding that the decree was a nullity. The facts upon which he based his conclusion were, that on the 13th May 1907, a few days before the decree, a notification was issued under section 13 of the Court of Wards Act (I of 1905) to the effect that the Court of Wards would assume superintendence of the estate of the defendants with effect from the 15th May 1905. The Joint Subordinate Judge was informed of the notification, and was asked by the defendants to make the Court of Wards a party. He, however, declined to do so, saying that the section had no retrospective effect Presumably by "the section" he meant section 32 of the Court of Wards Act of 1905. We agree with the learned Subordinate Judge in thinking that that section was not intended to apply to pending suits. In terms it refers to suits "brought by or against" a Government ward. The suit before the Joint Subordinate Judge was not such a suit. Section 32 must be read with section 31, which provides that before such a suit is brought, notice shall be delivered to, or left at the office of the Court of Wards. This is impossible in the case of a suit pending at the time of the assumption of superintendence of the estate by the Court of Wards. Moreover, the phraseology of section 32 relating to suits makes no such distinction as that of section 17 which

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relates to execution of decrees, and provides that no proceeding in execution of any decree against the Government ward or his property shall be *instituted or continued* until the decree-holder files a certificate from the Court of Wards that the decree claim has been duly submitted. That apparently is the only provision which the Legislature has thought necessary to make for the protection of the estate of a Government ward where a decree has been passed in a suit *instituted before the assumption of superintendence* by the Court of Wards. For the above reasons, we set aside the order of the District Judge dismissing the darkhast with costs. The respondents must pay the costs, if any, of the hearing in the lower Court and the costs of this appeal.

Order set aside.

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod

1912 *December 4.*

IN THE MATTER OF MEGHRAJ GANGABUX, AN INSOLVENT.

Presidency Towns Insolvency Act (III of 1909), sections 15 (2) and 21 (1)—Adjudication, annulment of, when Court has jurisdiction to pass order for—Debts necessity that all debts of the insolvent actually and properly proved in the bankruptcy should have been fully paid in cash—Conduct of insolvent applying for annulment of an adjudication order, duty of Court to scrutinize—Discretion of Court how exercised.

A debtor who has been adjudicated insolvent on his own petition cannot, even with the leave of the Court, withdraw his petition Section 15 (2) of the Presidency Towns Insolvency Act only applies to petitions that are pending before any order has been made, as also does section 13 (8) dealing with petitions by creditors Once an order of adjudication has been made the debtor becomes an insolvent and remains so until the order of adjudication is annulled or he obtains his discharge The Court can only annul the order of adjudication under section 21 of the Act if the Court is of opinion that the debtor ought not to have been adjudicated insolvent or it is proved to

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the satisfaction of the Court that the debts of the insolvent have been paid in full and in the latter case the "debts" including at least all debts actually and properly proved in bankruptcy must have been fully paid in cash

It is the duty of the Court to scrutinize the conduct of an insolvent applying for an order of annulment. The Court is given a discretion by section 21 and it would not be a good exercise of that discretion to make an order of annulment of an adjudication where, if the insolvent were applying for his discharge, an order of discharge would not be granted

In re Keet(1), applied

THE applicant was adjudicated an insolvent on the 26th June 1912. He had only three creditors, two of whom were secured by mortgage of the applicant's immoveable property. The third one was unsecured; but he accepted a sum of Rs. 500 from a relative of the applicant in full settlement of his claims. The secured creditors had no objection to the "insolvent withdrawing his petition" and consented "to his estate re-vesting in him .. ... our respective mortgages being still unpaid and in any way unaffected by such withdrawal of the petition."

The applicant applied to withdraw his petition for insolvency and schedule

H U. Patel, for the applicant, relied on section 15 (2) of the Presidency Towns Insolvency Act.

The Official Assignee objected on the ground that the course adopted was unusual. The insolvent was bound to submit a scheme for composition as required by the Act.

MACLEOD, J. :—This is an application on behalf of an adjudicated insolvent that he should be allowed to withdraw his petition on the ground that he has settled with his creditors.

Counsel referred to section 15, sub-section (2) of the Presidency Towns Insolvency Act (III of 1909) but that sub-section as well as sub-section (8) of section 13 only

(1) [1905] 2 K B 666 at p 677.

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apply to petitions which are pending before any order has been made.

Once an order of adjudication has been made, the debtor who presents his own petition, or the respondent in the case of a creditor's petition, becomes an insolvent, and remains so until the order of adjudication is annulled or he obtains his discharge.

The Court has no jurisdiction to annul the order of adjudication except in the manner provided for by the Act. Under section 21 (1) the order can be annulled if the Court is of opinion that the debtor ought not to have been adjudged insolvent, or if it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full.

This clause is the same as section 35 (1) of the English Bankruptcy Act of 1883. In *In re Keet*[1] it was held that to satisfy that section the "debts" including at least all debts which have been actually and properly proved in bankruptcy must have been fully paid in cash.

Under section 22 the order may be annulled if insolvency proceedings are pending in any other British Court.

Under section 30 the order shall be annulled if the Court approves of a proposal for a composition or for a scheme of arrangement

Under the Indian Insolvency Act a practice had been established in this Court of allowing an insolvent to apply for leave to withdraw his petition on serving notices on all his creditors in the Schedule, and if no creditor appeared to oppose the application, leave was granted as a matter of course.

The Court did not concern itself with the conduct of the insolvent or the manner in which he had settled the claims of his creditors.

(1) [1905] 2 K B. 666 at p. 677.

It is now the duty of the Court to scrutinize the conduct of every insolvent who applies either for an order of discharge or for the annulment of the adjudication order. Under section 21 the Court has a discretion to make an order of annulment, and when the ground on which the application is made is the payment of the debts in full, it is entitled not only to be satisfied that as a matter of fact the debts have been fully paid in cash but also to take into consideration the antecedent conduct of the debtor, since it would not be a good exercise of that discretion to make an order of annulment where, if the insolvent were applying for his discharge, an order of discharge would not be granted: see per Stirling, L. J., in *In re Keet*[1]. When a proposal is made by an insolvent for a composition or a scheme of arrangement, provision has been made by sections 28 and 29 that the proposal should be placed before the creditors in the prescribed manner, whereby the statutory majority of creditors can bind the minority, and all creditors receive equal treatment, thus preventing one or more creditors from refusing to accept the debtor's proposal except on preferential terms.

Moreover before the Court approves of the proposal it is bound to consider the conduct of the insolvent.

This application must be refused. That it ever was made seems to be due to a failure to comprehend the change introduced by the Insolvency Act of 1909.

Attorney for the applicant *Mr G. H. Dalal.*

Application refused.

H. S. C.

(1) [1905] 2 K. B. 666 at p. 677.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar

1913
March 18

BURJORJI RUTTONJI BOMANJI (APPELLANT AND DEFENDANT) *v.* BHAGWANDAS PARASHRAM, A FIRM (RESPONDENTS AND PLAINTIFFS).*

Pakki adat *transactions, incidents of—Wagering, defence of.*

From about the end of June 1908 the defendant, a young man, without much experience of business, entered into *pakka adat* transactions for the sale of linseed with the plaintiffs who were a firm of Marwari shroffs and merchants in a large way of business dealing as merchants and commission agents, largely in cotton and to a small extent in linseed. There was one transaction in cotton between the parties and the defendant entered into transactions in linseed to the extent of 4,000 tons in all with the plaintiffs, which transactions the plaintiffs passed on to various purchasers, 39 in all, between which purchasers and the defendant there was no privity whatever. In the contract made by the plaintiffs with each of the said purchasers there was a term that delivery should not be given to the firm of Nairondas Rajaram & Co., a Marwari firm, who were in the habit of insisting on delivery and of refusing to settle contracts by the payment or receipt of differences.

The plaintiffs subsequently attempted to secure evidence to show that the transactions between themselves and the defendant were genuine transactions and not wagers. They endeavoured to induce the defendant to sign a draft letter prepared by the plaintiffs' attorneys in which instructions were given for the purchase of a small part of the 4,000 tons of linseed for the sale of which the defendant had entered into transactions with the plaintiffs and ultimately induced the defendant to sign a draft letter acknowledging the correctness of the statements made in a letter of the plaintiffs' attorneys to the defendant setting out the plaintiffs' version of the transactions between the parties. The plaintiffs further purchased and delivered 300 tons of linseed in part fulfilment of their contracts with the 39 purchasers and as to the balance of 3,700 tons the contracts with these purchasers were settled by the payment of differences. It appeared, however, that the purchase of 300 tons had been effected by the plaintiffs with the view to influence the result of litigation.

Held, that in view of the fact that the *pakka adatia* was not a disinterested broker but a party to the contract whose intention to gamble or otherwise might well be *known at the inception of the contract, and that there was no*

* Appeal No 74 of 1912 : Suit No 272 of 1911.

privity between the defendant and the 39 buyers from the plaintiffs, the existence of such purchasers was only relevant as affording an indication of the plaintiffs' intention at the time of the contracts with the defendant, but in view of the condition that delivery should not be given to Narrondas Rajaram & Co., it appeared that it was not intended that delivery should be given to the 39 purchasers by the plaintiffs and accordingly the said 39 contracts were not a sufficient indication of an intention on the part of the plaintiffs to call for delivery from the defendant.

Held, further, that on an examination of the business of the contracting parties and of the surrounding circumstances of the case it appeared that the common intention of the parties was that the plaintiffs and the defendant should deal in differences and settle that way and that accordingly the suit must fail.

Bhagwandas v. *Kanji*(1), discussed.

THE plaintiffs in this suit were a firm of Marwari merchants and shroffs doing business in Bombay in a large way and dealing largely in cotton and to a small extent in linseed. The defendant was a Parsi of about 29 or 30 years of age who had won a large sum of money in a sweepstake and thereafter entered into speculative transactions in American futures and fine Broach. In June 1910 it appears that the defendant was persuaded by one Hargopal, the munim of the plaintiffs, to enter into forward transactions in cotton, linseed, etc., through the plaintiffs as his *pakka adatias* and accordingly the defendant deposited with the plaintiffs the sum of Rs. 61,000 by two instalments as margin against the transactions intended to be undertaken between the parties. The defendant then entered into one transaction for the sale of cotton through the plaintiffs which resulted in a small profit to the defendant with which he was credited by the plaintiffs and also entered into transactions for the sale of 1,000 tons in all of linseed which resulted in a considerable loss in excess of the margin money deposited by the defendant.

(1) (1905) 30 Bom. 205.

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After the above transactions had been entered into the plaintiffs requested the defendant to sign a draft letter to the plaintiffs prepared by their solicitors to the following effect:—

"With reference to the 4,000 tons of linseed sold by you as my *pakka adatia* for September 1910 delivery I have to request you to purchase on my account from the bazar 250 tons of ready linseed for the present and deliver the same against the contracts made by you on my behalf. The value of the 250 tons so to be purchased on my account should be debited to my account and I will pay interest on the same at 7 annas per cent. per month all other usual charges will be allowed"

The defendant refused to sign this draft but on receiving a letter from the plaintiffs' solicitors to the following effect:—

"We are instructed by our clients Messrs Bhagwandas Parashram to state that they as your *pakka adatias* under your instructions and orders received from you on or about the respective dates mentioned below sold 4 000 tons of linseed as under at the rates mentioned below

1,000 tons on Ashad Vad 9 at Rs 11-5-0 per cwt
800 tons on Ashad Vad 15, *viz* —
500 tons at Rs 11-10-0
100 tons at Rs 11 10-9
100 tons at Rs 11-10-6 and
100 tons at Rs 11-10-7¼ and
2,200 tons on Ashad Sud 5 at Rs 11-14-7¼ per cwt. deliverable in September 1910 That the time to deliver the said 4,000 tons of linseed begins from tomorrow and according to the practice of the Bombay Market the option to deliver the goods lies with the sellers We are therefore instructed by our said clients to call upon and to require you to supply to our clients the quantity of linseed agreed to be sold by you to enable our clients to carry out your aforesaid sales or to give our clients the necessary instructions to purchase as much quantity of ready linseed from the Bombay Market and then *to deliver the same against the sales effected by them on your behalf.*

We are also instructed to state that our clients undertake not to buy ready linseed or settle business without your mutual consultation or without your written consent in that behalf

Our clients also inform us that they have on the 1st of July last received from you Rs 61,000 as a deposit against the transactions and it has been agreed that interest at 7 annas per cent. per mensem is to run on the account between you and them."

The defendant signed a reply also drafted by the plaintiffs' solicitors to the following effect:—

"I beg to acknowledge receipt of your letter of date and in reply I confirm what is written therein, subject to correction in the event of there being any mistake.

I shall give your clients instructions in the matter for purchase of ready goods or buying by forward contract."

Thereafter the plaintiffs frequently called on the defendant to deposit more margin money on account of his transactions with the plaintiffs but the defendant without definitely refusing avoided depositing any further margin money.

The plaintiffs in the meantime had passed on their transactions with the defendant by entering into sub-contracts with 39 purchasers for the whole of the 4,000 tons of linseed involved and in part fulfilment of these sub-contracts purchased and delivered 300 tons of linseed, as to the balance of 3,700 tons these sub-contracts being settled by payment of differences. The defendant however was able to prove an admission by the plaintiffs that the 300 tons actually purchased by them had been so purchased for the purpose of proving the genuineness of the transactions between the parties in the event of litigation.

The plaintiffs sued the defendant for the amount of the loss occasioned by the said transactions giving credit to the defendant for the amount of the margin deposited by him and for the amount of the profit on the successful transaction in cotton. The defendant in his written statement stated *inter alia* that the common understanding between the parties with respect to the abovementioned transactions was that no delivery should be given or taken but that differences only should be dealt in.

The suit came on for hearing before Mr. Justice Beaman who decided in favour of the plaintiffs. After

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reviewing the evidence and after dealing particularly with the purchase of 300 tons of linseed by the plaintiffs for the purpose of proving the genuineness of the transactions involved in the suit the learned Judge said:—

Certainly had this been a transaction between the defendant and the plaintiff-firm themselves I should, in view of that little additional touch and the virtual certainty that the plaintiffs knew exactly what the defendant had in view, have been disposed to hold that they knew that the defendant was merely gambling, and, therefore, neither they nor he at any time had the intention of either giving or taking delivery. But considering, as I have *already said, that they immediately passed all these contracts on to* numerous other purchasers, I do not think there is any room left for any such conclusion.

The *defendant appealed.*

Strangman, with *Davar*, for the defendant-appellant:—The plaintiffs are Marwari shroffs, dealing principally in cotton and wheat; the defendant is a young man of no experience who made his money in a lottery.

(Referring to the sub-contracts) every single one of these transactions was settled by cross-contracts except one which was given for the purposes of the Court.

Refers to *In re Gieve*[1].

Jinnah, with *Jayaker, for the plaintiff-respondents*:—The defendant has had business experience in South Africa. His object is to make out that he is a gambler but he is not to be believed.

Refers to the headnote in *Forget* v. *Ostigny*[2].

The plaintiff-firm do business on a large scale, they take and give delivery. They were employed as *pakka adatias* by the defendant. On the receipt of his orders

[1] [1899] 1 Q. B. 794.

[2] [1895] A. C. 318

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they put the orders on the market and sold. The burden of proof is on the defendant to show that the understanding was only to pay differences.

Refers to section 30 of the Contract Act (IX of 1872).

There must be an agreement to wager; what agreement is there here which is a wager?

Refers to *Bhagwandas* v. *Kanji*[1]; *Perosha Cursetji* v. *Manekji Dossabhoy*[2]; *Sassoon* v. *Tokersey*[3].

Strangman replies.

C. A. V.

SCOTT, C. J.:—This suit was brought by the plaintiffs, a firm of Marwari merchants, who act *inter alia* as *pakka adatias* to recover from the defendant Rs. 90,763-14-6 and interest as the amount due by the defendant to the plaintiffs as his *pakka adatias* in respect of certain contracts in cotton and linseed.

The defence was that the transactions were wagering transactions and that, therefore, the sum claimed could not be recovered: the defendant also counter-claimed repayment of two sums of Rs. 50,600 and Rs. 10,400, deposited by him as he alleged at fixed deposit but as the plaintiffs alleged as margin-money or security in respect of the contracts above mentioned.

The only contract in cotton was dated the 30th June 1910. It was for the purchase by the defendant from the plaintiffs of 2,000 bales of Broach Cotton for March 1911. The market went in the defendant's favour and the contract was closed for Rs. 5,804-2-3 without any delivery taking place. The defendant has received credit in the account sued on for this sum. The linseed contracts are as follows:—

(1) (1905) 30 Bom. 205 at pp. 216, 217. (2) (1898) 22 Bom. 899.
(3) (1904) 28 Bom. 616.

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One dated the 1st of July 1910 for the sale by the defendant to the plaintiffs of one thousand tons of linseed at Rs. 11-5-0 per cwt. Another of the 6th of July 1910 for the sale by the defendant to the plaintiffs of 800 tons at rates varying from Rs. 11-10 to Rs. 11-10-9 per cwt. The plaintiffs further allege that the defendant orally agreed to sell them a further 2,200 tons of linseed on the 10th of July 1910.

Applying the recognised rule in all cases where the defence of wagering contract is set up, the business of the contracting parties and the surrounding circumstances of the case must be examined.

The plaintiffs are Marwari shroffs and merchants in a large way of business who deal largely in cotton as merchants and commission agents but only to a small extent in linseed. They receive from constituents for sale in Bombay on an average not more than 150 tons of linseed in the year. The defendant is a Parsi, 29 or 30 years of age, who has never had any regular business. In September 1909 he won a St. Ledger Sweep of about a lac-and-a-quarter and thereafter entered into cotton speculation in American futures and fine Broach through the agency of Messrs. Bruel & Co. after depositing margin-money with them. The transactions proved unprofitable but after paying his losses he received back from Bruel & Co. the balance of his margin-money in two sums, Rs. 15,000 and Rs. 10,161. This was at the end of June 1910. At that time it is proved that the defendant and Hargopal, the plaintiffs' then Munim, used constantly to meet in the evening at Chowpatty and the defendant says Hargopal suggested he should deal in linseed in differences and settle in that way. Business eventually commenced between the parties on the 30th of June with the cotton contract above mentioned. On the 1st July the defendant signed a letter stating he had given Rs. 50,600 on the previous day and

Rs. 10,400 on that day to be retained at interest as security against business in cotton and linseed. On the 30th of August 1908 the parties went together to Messrs. Tyabji Dayabbai & Co., the plaintiffs' solicitors, where the managing clerk drafted a letter for the signature of the defendant. It ran as follows :—

With reference to the 4,000 tons of linseed sold by you as my *pakka adatias* for September 1910 delivery I have to request you to purchase on my account from the bazar 250 tons of ready linseed for the present and deliver the same against the contracts made by you on my behalf. The value of the 250 tons so to be purchased on my account should be debited to my account and I will pay interest on the same at 7 annas per cent per month all other usual charges will be allowed.

The defendant however declined to sign it. It seems strange that a simple request to the agent to carry out a small part of a pending contract should necessitate the intervention of solicitors. There can, we think, be no doubt that the letter was intended to create evidence from which might be inferred the genuineness of the contract which would fall to be performed or settled in the following month. On the following day the solicitors were again requisitioned and produced another draft in the following terms :—

We are instructed by our clients Messrs. Bhagwandas Parashram to state that they as your *pakka adatias* under your instructions and orders received from you on or about the respective dates mentioned below sold 4,000 tons of linseed as under at the rates mentioned below. 1,000 tons on Ashad Vad 9 (1st July 1910) at Rs. 11-5-0 per cwt.

800 tons on Ashad Vad 15 (6th July 1910) viz. 500 tons at Rs. 11-10-0, 100 tons at Rs. 11-10-9, 100 tons at Rs. 11-10-6 and 100 tons at Rs. 11-10-7¼ and 2,200 tons on Ashad Sud 5 (11th July 1910) at Rs. 11-14-7½ per cwt. deliverable in September 1910. That the time to deliver the said 4,000 tons of linseed begins from tomorrow and according to the practice of the Bombay Market the option to deliver the goods lies with sellers. We are therefore instructed by our said clients to call upon and require you to supply to our clients the quantity of linseed agreed to be sold by you to enable our clients to carry out your aforesaid sales or to give our clients the necessary instruc-

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tions to purchase as much quantity of ready linseed from the Bombay Market and then to deliver the same against the sales effected by them on your behalf.

We are also instructed to state that our clients undertake not to buy ready linseed or settle business without your mutual consultation or without your written consent in that behalf.

Our clients also inform us that they have on the 1st of July last received from you Rs 61,000 as a deposit against the transactions and it has been *agreed that interest at 7 annas per cent per mensem is to run on the account* between you and them

A reply was also drafted for the defendant by the solicitors which the defendant did sign. It ran thus:

Bombay, 31st August 1910.

Messrs TYABJI DAYABHAI & Co,

Attorneys for

Messrs. BHAGWANDAS PARASHRAM

DEAR SIRS,

I beg to acknowledge receipt of your letter of date and in reply I confirm what is written therein subject to correction in the event of there being any mistake

I shall give your clients instructions in the matter for purchase of ready goods

Yours faithfully

The plaintiffs thus got an acknowledgment of a sale as *pakka adatias* of 4,000 tons of linseed on account of the defendant It is to be noted, however, that when the plaintiffs deal with Bombay constituents they usually employ a broker See for example the evidence of the partner in Narrondas Rajaram & Co. and the agency by which the thirty-nine contracts for sale of linseed in this case were effected. It does not seem clear that the incidents of the *pakki adat* relationship should be assumed to apply to the contracts of plaintiffs and defendant of which the evidence affords no trace of an agreement between the parties. The case however has been tried on the footing that the plaintiffs were *pakka*

adatias of the defendant and we will deal with it on that footing. A correspondence was then commenced:—

Bombay, 9th September 1910.

BURJORJI RUTTONJI BOMANJI DUBASH, Esqr.

SIR,

Our clients Messrs Bhagwandas Parashram have placed in our hands copy of a letter, dated the 31st ultimo, addressed by their former solicitors to you regarding 4,000 tons of linseed which you had instructed to sell as per particulars given in the said letter and requiring you to place our clients in a position to give delivery of the said linseed of the quantity agreed to be sold by you and your reply thereto of the same date intimating that you would give instructions to our clients for the purpose of ready goods or buying by forward contract. As our clients have not received any instructions nor any margin-money from you, we are now instructed to call upon you to furnish margin money amounting to Rs 80,000 which with the sum of Rs 61,000 already deposited by you as margin-money makes the sum of Rs 1,41,000 which is the approximate difference between the market rate of today and the price at which you have contracted to sell the goods and to give you notice that unless within four days from the receipt hereof by you our clients receive the said margin-money or sufficient quantity of goods or you make arrangement satisfactory to our clients to meet the contracts on due date our clients reserve their right to make arrangements for closing the transaction by purchase of ready goods or by forward contracts as they may think proper holding you liable for all costs, charges and expenses incidental thereto

Yours truly,

(Sd) BICKNELL MERWANJI and ROMER

Bombay, 12th September 1910

Messrs BICKNELL MERWANJI and ROMER,
Solicitors, Bombay

DEAR SIRS,

Re Bhagwandas Parashram and myself

Your letter of 9th September came to my hands on Saturday evening at 7 at Chowpatty I am afraid your clients have not had all true facts before you otherwise you would not have written the letter under reply Hence I do not think it advisable to reply

Yours faithfully,

(Sd) BURJOR B BOMANJI.

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Bombay, 14th September 1910.

BURJOR R. BOMANJI, Esqr.

SIR,

Bhagwandas Parashram v. Yourself.

We have communicated the contents of your letter of the 12th instant to our clients

Our clients state they have placed all true facts before us and have also placed the correspondence that has passed between you and them as well as their former attorney's letter to you of the 1st ultimo and your reply thereto of the same idem. If you however maintain that our clients have not placed all true facts before us will you please state what the true facts are as alleged by you?

Our clients state that our letter of the 9th instant had been addressed to you in respect of the linseed transactions only but we find from the letters addressed by you to them that you have entered into transactions of purchase of cotton for March next delivery and that at the time these transactions were entered into you had agreed to deposit with them margin-money and had agreed to deposit further margin-money if the accounts deposited by you from time to time proved insufficient to cover the differences That as to cotton transactions you authorised them to enter into transaction for sale of cotton for March delivery against the cotton purchased and that by reason of the counter contracts cotton transactions resulted in profits payable to you in March next but at your request our clients have after deducting discount, brokerage and commission thereout credited to your account the balance of Rs. 5,804-2-3 and sent you an acknowledgment through broker Makanji and retained the amount with themselves with your consent as further margin on account of linseed transactions.

That when the market for linseed went up beyond the limits of the deposit our clients asked for further deposit and you from time to time promised to pay the same but you did not do so except as to the aforesaid sum of Rs. 5,804-2-3 which you caused to be credited as aforesaid and our clients state that since you received our letter of the 9th instant you had an interview with our clients when you informed them that you would not deposit any margin nor give any definite reply till due date of delivery and since our letter under reply our clients state that the market has gone up still further with the result that to cover them a further margin of one lakh has to be deposited by you with them under the arrangement and that they cannot wait further.

We are therefore instructed to give you this notice that unless within 24 hours from the receipt hereof by you, you deposit a further sum of rupees one

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lakh, or comply with the requisitions contained in our said letter of the 9th instant our clients reserve their right to proceed in manner intimated by our said letter.

Yours truly,

(Sd.) BICKNELL MERWANJI and ROMER.

Bombay, 28th September 1910.

Messrs BICKNELL MERWANJI and ROMER,

Solicitors, Bombay

DEAR SIRS,

Re Bhagwandas Parashram.

In reply to your letter of the 14th instant I beg to state that I am sorry that I could not reply to your letter earlier than now

Will you let me know to what letter you refer in para No 2 of your letter?

After knowing that I shall be in a position to give a detailed reply to your letter

Yours truly,

(Sd.) BURJORJI R BOMANJI

Bombay, 29th September 1910

BURJORJI R. DUBASH, Esqr

SIR,

Referring to previous correspondence addressed by us to you on behalf of our clients Messrs Bhagwandas Parashram, we are instructed by our clients to remind you that the last day for giving delivery of linseed under the contract entered into by our clients as your *pakka adat* agents on your behalf is the 30th instant, but that you have not yet made an arrangement for giving delivery of the said goods. Our clients have purchased 300 tons for ready delivery on your account and risk and provision has to be made for 3,700 tons more.

We are therefore instructed by our clients to call upon you to provide for 3,700 tons of linseed to be given delivery of by the 30th instant within due time and to give notice that in default of your compliance with the aforesaid requisition our clients will, as your *pakka adat* agents take such steps towards the fulfilment of the contract as they may think proper according to the market rate of that day

Yours truly,

(Sd.) BICKNELL MERWANJI and ROMER

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Bombay, 1st October 1910

BURJOR R. BOMANJI, Esqr.

DEAR SIR,

In continuation of our previous correspondence we are instructed by our clients Messrs. Bhagwandas Parashram to inform you that the contracts for 4,000 tons deliverable on your behalf yesterday were dealt with by our clients as follows —

By purchase of 300 tons at Rs. 13-15-0 as intimated in our letter of the 29th ultimo and 350 tons at Rs 13-8-0, 2,575 tons at Rs. 13-9-3, 700 tons at Rs. 13-9-0 and 75 tons at Rs 13 8-10½ per cwt.

The account of the amount payable by you will be made up and forwarded to you in due course

Yours truly,

(Sd) BICKNELL MERWANJI and ROMER.

On the 30th of September an interview took place at defendant's house between Hargopal and a member of the plaintiffs' firm and the defendant and a friend in the presence of a concealed shorthand writer. From the report of the conversation on that occasion which has been proved it appears that the plaintiffs admitted that the purchase of 300 tons ready (which defendant denied he had authorised) was done for the purpose of the Court's proceedings.

Turning now to the surrounding circumstances proved on behalf of the plaintiffs we find that on the occasion of each contract for sale of linseed by the defendant they employed brokers to make small contracts (thirty-nine in all) with various Marwari firms for the sale of linseed aggregating that sold by the defendant. In each case the contract was in the same form, of which one of the conditions was 'not to be delivered to Messrs. N. R. & Co.' N. R. & Co. means Narrondas Rajaram & Co. It is explained by one of the partners in this firm that they always insist on delivery of produce contracted for, being large exporters—and that is why the Marwaris boycott them in contracts of the class under consideration.

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BEJORJI RUTTONJI v. BHAGWANDAS PARASHRAM.

We reverse the decree of the lower Court dismiss the suit and the counter-claim with costs.

Attorneys for the appellant: *Messrs. Mulla and Mulla.*

Attorneys for the respondents: *Messrs. Tyabji Dahyabhai & Co.*

Decree reversed.

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

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CHATRU VALAD ABAJI PATIL (ORIGINAL DEFENDANT No. 2), APPELLANT, v. KONDAJI VITHAL PATIL (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), section 257A—Decree—Satisfaction—Decree not carrying interest—Mortgage passed in satisfaction of decretal debt made payable in instalments—Interest payable on failure to pay instalments—Covenant for interest can be severed from the covenant as to repayment of principal—Agreement not void so far as concerned principal.

The plaintiff obtained a decree against the defendant for Rs. 800 without interest, but with costs which amounted to Rs. 89-12-0. In satisfaction of the decretal debt and in consideration of a cash advance of Rs. 10-4-0, the defendant passed a mortgage-deed for Rs. 900 in favour of the plaintiff. The amount of Rs. 900 was repayable in nine annual instalments of Rs. 100 each. On failure to pay any one instalment interest was to be charged at the rate of 1¼ per cent. per mensem, and the whole amount became payable on failure to pay any two instalments. None of the instalments having been paid, the plaintiff sued to recover Rs. 900 principal and Rs. 900 as interest. The lower Courts held that the mortgage-deed contravened the provisions of section 257A of the Civil Procedure Code (Act XIV of 1882) but they passed a decree for Rs. 900 in plaintiff's favour, as the covenant to pay interest was quite distinct and severable from the covenant to pay principal. The defendant having appealed:—

Held, confirming the decree, that the primary and main agreement was to pay a sum of money which was not in excess of the decretal amount and that it was only on failure to fulfill that agreement that interest was to be charged

* Second Appeal No. 833 of 1912.

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the parties to his contract? There are in fact no parties to the selling contract but the client and his *adatia* who is the buyer. The *adatia* is not the disinterested broker. He is a party to the contract whose intention may well be known at the time of its inception. The learned Judge says that had this been a transaction between the defendant and the plaintiffs' firm themselves, he should in view of the evidence of the purchase of 300 tons of ready linseed bought 'for the Court's proceedings' and the virtual certainty that the plaintiffs knew exactly what the defendant had in view, have been disposed to hold that neither plaintiffs nor defendant at any time had the intention of either giving or taking delivery; but considering they immediately passed all the contracts on to numerous other purchasers there was no room left for such a conclusion. But if, as we think it must be assumed, there was no privity between the defendant and the thirty-nine buyers their existence is only relevant if it affords an indication of the intention of the plaintiffs at the time of the defendant's contracts. But the condition in the thirty-nine contracts barring delivery to Narrondas Rajaram & Co. is we *think indication of an intention that delivery* should not be called for. If this is the correct inference the payments to the thirty-nine buyers, assuming them to have been seriously made, must be attributed to that form of sporting honour which leads Marwaris to pay up their gambling differences so long as they have money to do so. We are of opinion that the sub-contracts considering their conditions are not sufficient indication of an intention on the part of the plaintiffs to call for delivery from the defendant while all the other circumstances which have been alluded to point to the conclusion that the common understanding was as deposed to by the defendant that he and the plaintiffs should deal in differences and settle in that way.

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We reverse the decree of the lower Court dismiss the suit and the counter-claim with costs.

Attorneys for the appellant: *Messrs. Mulla and Mulla.*

Attorneys for the respondents: *Messrs. Tyabji Dahyabhai & Co.*

Decree reversed.

H. S. C.

APPELLATE CIVIL.

Before Mr Justice Heaton and Mr Justice Shah

CHATRU VALAD ABAJI PATIL (ORIGINAL DEFENDANT No 2) APPELLANT, v. KONDAJI VITHAL PATIL (ORIGINAL PLAINTIFF) RESPONDENT.[°]

1913. *September 9.*

Civil Procedure Code (Act XIV of 1882), section 257A—Decree—Satisfaction—Decree not carrying interest—Mortgage passed in satisfaction of decretal debt made payable in instalments—Interest payable on failure to pay instalments—Covenant for interest can be severed from the covenant as to repayment of principal—Agreement not void so far as concerned principal

The plaintiff obtained a decree against the defendant for Rs. 800 without interest, but with costs which amounted to Rs 89-12 0 In satisfaction of the decretal debt and in consideration of a cash advance of Rs 10 4-0, the defendant passed a mortgage-deed for Rs 900 in favour of the plaintiff The amount of Rs 900 was repayable in nine annual instalments of Rs 100 each On failure to pay any one instalment interest was to be charged at the rate of 1¼ per cent. per mensem, and the whole amount became payable on failure to pay any two instalments. None of the instalments having been paid the plaintiff sued to recover Rs 900 principal and Rs 900 as interest The lower Courts held that the mortgage-deed contravened the provisions of section 257A of the Civil Procedure Code (Act XIV of 1882) but they passed a decree for Rs 900 in plaintiff's favour, as the covenant to pay interest was quite distinct and severable from the covenant to pay principal The defendant having appealed —

Held, confirming the decree, that the primary and main agreement was to pay a sum of money which was not in excess of the decretal amount, and that it was only on failure to fulfill that agreement that interest was to be charged

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the parties to his contract? There are in fact no parties to the selling contract but the client and his *adatia* who is the buyer. The *adatia* is not the disinterested broker. He is a party to the contract whose intention may well be known at the time of its inception. The learned Judge says that had this been a transaction between the defendant and the plaintiffs' firm themselves, he should in view of the evidence of the purchase of 300 tons of ready linseed bought 'for the Court's proceedings' and the virtual certainty that the plaintiffs knew exactly what the defendant had in view, have been disposed to hold that neither plaintiffs nor defendant at any time had the intention of either giving or taking delivery; but considering they immediately passed all the contracts on to numerous other purchasers there was no room left for such a conclusion. But if, as we think it must be assumed, there was no privity between the defendant and the thirty-nine buyers their existence is only relevant if it affords an indication of the intention of the plaintiffs at the time of the defendant's contracts. But the condition in the thirty-nine contracts barring delivery to Narrondas Rajaram & Co. is we think indication of an intention that delivery should not be called for. If this is the correct inference the payments to the thirty-nine buyers, assuming them to have been seriously made, must be attributed to that form of sporting honour which leads Marwaris to pay up their gambling differences so long as they have money to do so. We are of opinion that the sub-contracts considering their conditions are not sufficient indication of an intention on the part of the plaintiffs to call for delivery from the defendant while all the other circumstances which have been alluded to point to the conclusion that the common understanding was as deposed to by the defendant that he and the plaintiffs should deal in differences and settle in that way.

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We reverse the decree of the lower Court dismiss the suit and the counter-claim with costs.

Attorneys for the appellant: *Messrs. Mulla and Mulla.*

Attorneys for the respondents: *Messrs. Tyabji Dahyabhai & Co.*

Decree reversed.

H. S. C.

APPELLATE CIVIL.

Before Mr Justice Heaton and Mr Justice Shah

1913 *September 9.*

CHATRU VALAD ABAJI PATIL (ORIGINAL DEFENDANT No 2), APPELLANT, v KONDAJI VITHAL PATIL (ORIGINAL PLAINTIFF), RESPONDENT °

Civil Procedure Code (Act XIV of 1882), section 257A—Decree—Satisfaction—Decree not carrying interest—Mortgage passed in satisfaction of decretal debt made payable in instalments—Interest payable on failure to pay instalments—Covenant for interest can be severed from the covenant as to repayment of principal—Agreement not void so far as concerned principal

The plaintiff obtained a decree against the defendant for Rs 800 without interest, but with costs which amounted to Rs 89-12-0 In satisfaction of the decretal debt and in consideration of a cash advance of Rs 10-4-0, the defendant passed a mortgage deed for Rs 900 in favour of the plaintiff. The amount of Rs 900 was repayable in nine annual instalments of Rs 100 each. On failure to pay any one instalment interest was to be charged at the rate of $1\frac{1}{4}$ per cent. per mensem, and the whole amount became payable on failure to pay any two instalments None of the instalments having been paid, the plaintiff sued to recover Rs 900 principal and Rs 900 as interest The lower Courts held that the mortgage-deed contravened the provisions of section 257A of the Civil Procedure Code (Act XIV of 1882) but they passed a decree for Rs. 900 in plaintiff's favour, as the covenant to pay interest was quite distinct and severable from the covenant to pay principal The defendant having appealed —

Held, confirming the decree, that the primary and main agreement was to pay a sum of money which was not in excess of the decretal amount and that it was only on failure to fulfill that agreement that interest was to be charged

° Second Appeal No. 833 of 1912

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that is, it was only something which came into operation when there was a breach of the agreement; and that the primary agreement was therefore not void under section 257A of the Civil Procedure Code, 1882

Bhagchand v. *Radhakisan*(1), followed

SECOND appeal from the decision of G. R. Datar, Additional First Class Subordinate Judge at Nasik, confirming the decree passed by M. N. Choksi, Subordinate Judge at Malegaon.

Suit to recover money due on mortgage.

The plaintiff obtained a decree against the defendant for Rs 800 and Rs 89-12-0 were awarded for costs. Interest was not allowed by the decree. The defendant was an agriculturist.

On the 21st October 1895, the defendant passed a deed of mortgage in favour of the plaintiff for Rs. 900. The consideration was made up of Rs. 889-12-0 (the decretal amount) and Rs. 10-4-0 (received in cash). The mortgage amount was made repayable in nine annual instalments of Rs. 100 each. The material portion of the deed ran as follows:—

"I shall pay off all the money at the stated period, in nine years from the aforesaid date. the instalment shall be paid every year by me. in case of default in payment of the instalment, I shall be paying interest at the rate of 1¼ per cent. per mensem; in case of default of two instalments, I shall pay off all your abovementioned money, and shall not put forth any such excuse as that of the period having not expired or any such other excuse."

None of the instalments were paid in time or at all.

On the 6th August 1910, the plaintiff sued to recover the amount of Rs. 900 the principal secured by the mortgage and Rs. 900 by way of interest.

The Subordinate Judge held that so far as the principal amount secured by the mortgage was concerned, the deed did not contravene the provisions of section 257A of the Civil Procedure Code (Act XIV of 1882). He held that the agreement to pay interest was quite

(1) (1903) 28 Bom. 62.

separable and disallowed. He passed a decree awarding the principal amount and costs, and made the amount payable in annual instalments of Rs. 150 each.

This decree was confirmed on appeal by the lower appellate Court.

The defendant appealed to the High Court.

Bhandarkar, with *A. G. Desai*, for the appellant :—The mortgage-deed is passed in excess of the amount due under the decree and it provides for interest, which is not provided for in the decree. It therefore offends against the provisions of section 257A of the Civil Procedure Code (Act XIV of 1882) and is void. See *Heera Nema* v *Pestonji*[1] and *Bhagabai* v. *Narayan*[2]. The agreement to pay interest is one with the agreement to repay principal and cannot be separated. The case of *Bhagchand* v. *Radhakisan*[3] is in conflict with the case of *Heera Nema* v. *Pestonji Dossabhoy*[1] and with *Bhagabai* v. *Narayan*[2]. See *Davlatsing* v. *Pandu*[4].

Thakore, with *K. H. Kelkar*, for the respondent :—The principal amount secured by the mortgage is not in excess of the decretal amount for Rs. 10-4-0 are found to have been paid in cash. The agreement to pay interest is quite distinct and severable from the agreement to repay principal and may be discarded. The agreement to repay the principal is not affected by the provisions of section 257A of the Civil Procedure Code (Act XIV of 1882). See *Raichand* v. *Naran*[5] and *Govind* v. *Sakharam*[6]. The cases cited by the appellant commented on.

HEATON, J. :—This is a case under the Dekkhan Agriculturists' Relief Act and it involves the construction of the terms of section 257A of the old Civil

(1) (1898) 22 Bom 693
(2) (1907) 31 Bom. 552
(3) (1903) 28 Bom 62.
(4) (1884) 9 Bom. 176.
(5) (1904) 28 Bom. 310.
(6) (1904) 28 Bom. 383.

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Procedure Code. The mortgage-bond, with which we are concerned, as found by the Courts below, is for the payment of Rs. 900. Of this Rs. 889-12-0 was on account of a decretal debt and Rs. 10-4-0 was for fresh consideration, and the agreement was not made with the sanction of the Court. Therefore, if it offends against the provisions of section 257A, it is void.

Both the lower Courts have found this agreement is not void. The words of the agreement itself are these :—

"Altogether Rs 900, as mentioned above, I shall pay off all the money at the stated period in nine years from the aforesaid date. The instalments shall be paid every year by me In case of default in payment of the instalment, I shall pay interest at the rate of 1¼ per cent. a month"

The decree made no provision as to payment of interest, and therefore if the mortgage-bond is in fact an agreement to pay the decretal debt with interest, it does offend against the provisions of section 257A. Had there been no authorities bearing on the meaning of section 257A, I should be disposed to go contrary to the views expressed by the lower Courts here; but there is an authority and that is the case of *Bhagchand* v. *Radhakisan*[1] as explained in the case of *Govind* v. *Sakharam*[2]. That authority, although as I say I might if the matter were open decide differently, is absolutely intelligible and appears to me to be based on this principle. In that case, as in this, the primary and main agreement was to pay a sum of money which was not in excess of the decretal amount, and it was only on failure to fulfil this agreement that any interest would be charged, *i.e.*, the provision to pay interest is not a part of the agreement for the satisfaction of the decretal debt; it is only something which comes into operation when there is a breach of that agreement. Therefore the primary and main agreement is not void. I can find nothing in this application of the

(1) (1903) 28 Bom. 62. (2) (1904) 28 Bom. 383.

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law which conflicts with the Full Bench decision in *Heera Nema's case*[1] or in the case to which I myself was a party, that is, *Bhagabai* v. *Narayan*[2]. It may be that the reasoning adopted is rather fine and makes distinctions which a more robust or plain reading of the section would ignore, but these distinctions have been made in the past, and it appears to me to be better to follow them at least to the extent of the reasoning which leads to the result arrived at in the case of *Bhagchand* v. *Radhakisan*[3], especially, as to do so, it seems to me, does not work any injustice and does not militate against what after all is the main purpose of section 257A.

For these reasons, though I confess not without hesitation, I would confirm the decree of the lower Court and dismiss the appeal with costs.

SHAH, J. :—I concur. Having regard to the terms of the bond in this case I am of opinion that the present case is governed by the ruling in *Bhagchand* v. *Radhakisan*[3]. After considering the cases cited at the bar, I have come to the conclusion that there is no conflict between the ruling which I have referred to and the cases of *Heera Nema* v. *Pestonji*[1] and *Bhagabai* v. *Narayan*[2]. The *ratio decidendi* in *Bhagchand's case* as explained by the learned Judge, who decided that case, in the subsequent case of *Govind* v. *Sakharam*[4] is quite clear; and I am not able to see anything in the words of section 257A or in any of the cases cited to us which can justify the argument that the ruling tends to defeat the object of section 257A.

Appeal dismissed.

R. R.

(1) (1898) 22 Bom 693
(2) (1907) 31 Bom 552
(3) (1903) 28 Bom 62
(4) (1904) 28 Bom 383.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Macleod.

1913. *October 3.*

MALLIK SAHEB VALAD ABDUL SAHEB GANDIGIWAD AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* MALLIKARJUNAPPA BIN SHIVAMURTEYA (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu Law—Widow—Alienation—Consent of next reversioner—Validity of alienation—Legal necessity need not be proved—Registration Act (XVI of 1908), section 17, clause (d)*—Document showing assent—*Spes successionis *—Registration not compulsory*

A Hindu widow who had inherited property from her husband alienated a portion of it Her only daughter assented to the alienation a few days after by a writing which was not registered After the deaths of the widow and the daughter, an heir of the daughter sued to set aside the alienation on the ground that it was not made for legal necessity. The Court found the legal necessity not proved and decreed the claim. The defendant having appealed :—

Held, that the alienation having been assented to by the next reversioner, no question of legal necessity could arise

Held, also, that the assent in writing was not compulsorily registrable under section 17, clause (*d*) of the Registration Act, for the executant had at its date no more than *spes successionis* as heir

SECOND appeal from the decision of E. H. Leggatt, District Judge of Dharwar, reversing the decree passed by V. V. Wagh, Joint Subordinate Judge at Dharwar.

Suit to recover possession of property.

One Sivarudraya was the owner of the land in dispute. On his death, it passed to his widow Irawa, who had one daughter Gurushidawa.

In 1891, Irawa sold the land to the father of defendants Nos. 1 and 2. A few days after the sale, Gurushidawa executed an unregistered writing whereby she expressed her assent to the alienation, saying: "If I should happen to survive you I will not endeavour to set aside the alienation which you have made, and I will

* Second Appeal No. 890 of 1912.

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MALLIK SAHEB v. MALLIK ARJUNAPPA.

ratify it." Irawa died first and Gurushidawa died the day after.

The plaintiff, the son-in-law of Gurushidawa, filed the present suit to recover possession of the land alleging that the alienation by Irawa was without any legal necessity.

The Subordinate Judge held that the alienation was binding on the plaintiff and dismissed the suit.

On appeal, the District Judge came to the conclusion that the alienation was not supported by legal necessity and decreed the plaintiff's suit.

The defendants appealed to the High Court.

V. V. *Bhadkamkar*, for the appellant:—The consent of the daughter to an alienation by the widow passed an absolute title to the defendants. No question of legal necessity can arise. The alienation is binding on the plaintiff who is a remote reversioner. See *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[1]. The writing expressing assent does not require registration, for the daughter had at the time a *spes successionis*. Such an interest does not fall within section 17, clause (*d*) of the Registration Act. See *Abdool Hoosein* v. *Goolam Hoosein*[2] and *Sumsuddin* v. *Abdul Husein*[3].

G. S. Mulgaonkar, for the respondent:—The deed of assent by the daughter was passed without consideration. It did not bind her heirs. It also required registration, for the daughter had a contingent interest at the time within the meaning of the Registration Act.

BEAMAN, J.:—In 1891 a widow with the life estate Irawa sold the plaint property to the defendants. The then heir was the daughter of her deceased husband Gurushidawa. Thirteen days after the sale Gurushidawa

(1) (1907) 30 All. 1. (2) (1905) 30 Bom. 304.

(3) (1906) 31 Bom. 165.

1913.

MALLIK SAHEB v. MALLIK-ARJUNAPPA.

assented to it. The only difficulty that could have arisen in the case would have lain in proving the consent of Gurushidawa. That has been done by a writing. The Courts below appear to have doubted whether such a writing could be admitted without registration. Looking to the terms of the writing however, *it appears to us that it is clearly outside and beyond* the scope of section 17, clause (*d*), of the Registration Act. All that Gurushidawa had at that time was a *spes successionis* as heir. In the writing she purports to convey nothing but merely gives her consent to the alienation by her mother which amounts to this. She says "If I should happen to survive you I will not endeavour to set aside the alienation which you have made and I will ratify it." In point of fact she did survive her mother by one day. Now her daughter's husband seeks to set aside the alienation on the ground that it was without legal necessity. No question of that kind, we think, can arise, the facts being as we have just stated them.

The legal point is completely covered by the authority of *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*(1), a decision of the Privy Council.

We therefore think that the decree of the lower appellate Court must be reversed and the plaintiff's claim dismissed with all costs throughout upon him.

Decree reversed.

R. R.

(1) (1907) 30 All 1

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Macleod.

PIRSAB VALAD KASIMSAB ITAGI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v. GURAPPA BASAPPA KADIGI (ORIGINAL PLAINTIFF), RESPONDENT.* 1913. *October 7.*

Instrument reserving a life-estate to the maker, not a will—Instrument creating interest in adoptive mother—Value of the interest in excess of Rs. 100—Registration—Adverse possession—Absence of intention to acquire absolute interest—Limitation.

Any instrument which confers or reserves a life-estate to the maker is not a will.

A deed of adoption by which an interest is reserved to the wife of the adopter in immoveable property which she otherwise would not have possessed and could not have possessed when such interest exceeds in value Rs. 100 requires registration.

In a suit to recover possession by an adopted son against the lessees of the deceased adoptive mother who was in possession, where the plaintiff believed that the adoptive mother was entitled to remain in possession for life and she shared that belief and so remained in possession while the plaintiff took no steps to disturb her,

Held, that the plea of adverse possession by the adoptive mother could not arise, there being no intention to hold adversely so as to acquire an absolute estate.

SECOND appeal against the decision of E. H. Leggatt, District Judge of Dharwar, confirming the decree of H. V. Chinmulgund, Subordinate Judge of Gadag.

The plaintiff sued to recover from the defendants possession of two survey numbers and Rs. 600 for mesne profits for two years prior to the suit, together with subsequent mesne profits. The plaint alleged that the plaintiff's adoptive father Basappa was the owner of the lands, that Basappa and his wife Rachava adopted the plaintiff in January 1893 on the condition that plaintiff should be the owner after the deaths of Basappa and

* Second Appeal No. 791 of 1912.

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PIRSAB VALAD KASIMSAB v. GURAPPA BASAPPA.

Rachava, that Rachava should enjoy the property during her life-time, that after Basappa's death in 1894, Rachava enjoyed the property till her death which took place in March 1907, that after Basappa's death Rachava began to ill-treat plaintiff and drove him away, that thereafter plaintiff lived with and was maintained by his natural father, that Rachava died about 2½ years before the filing of the suit on the 9th October 1909, that the defendants were in wrongful possession and set up two leases executed in their favour by Rachava in the year 1902, and that the leases were unauthorized and not binding on the plaintiff. Hence the suit.

The material portion of the deed of adoption relied on by the plaintiff was as follows :—

You are full owner of all the articles and estate as above after our death. My kinsmen and the executors of my will (and) the administrators of my estate have no sort of right of ownership over this. You alone are fully entitled to the rights to the extent to which we are entitled.

Defendant 1, who was the tenant of one of the lands, answered *inter alia* that he had no knowledge of the plaintiff's conditional adoption, that for the purpose of making improvements in the land Rachava let it out to the defendant in the year 1902 under a registered deed, that plaintiff was estopped by his acts and conduct during and after Rachava's life-time from disputing the defendant's lease, that Rachava made the lease as manager of the family for consideration and for protection of the property, that the defendant spent Rs. 150 in improvements, that the plaintiff was not entitled to maintain the suit, that if the plaintiff was entitled to file the suit, he must pay to the defendant the amount spent by him in making the improvements and must indemnify him for future loss and that the claim was time-barred under Article 91 of the Limitation Act.

Defendant 2 added that he had improved the land under his charge by spending Rs. 700.

Defendant 3 was absent.

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The Subordinate Judge found that the deed of adoption relied on by plaintiff did not require registration, that the plaintiff's adoption was proved, that the plaintiff's adoptive mother Rachava was not authorized to make the leases in dispute so as to be binding on plaintiff after Rachava's death, that the plaintiff was not liable to pay anything to the defendants as a condition of recovering possession of the lands, that the plaintiff was entitled to recover from defendant 1 only Rs. 102 for the two years in suit and Rs. 177 a year for subsequent mesne profits and that the suit was not time-barred by Article 91 of the Limitation Act. The Subordinate Judge, therefore, allowed the plaintiff's claim for possession and profits as mentioned above.

On appeal by the defendants the District Judge confirmed the decree holding that the leases to the defendants were not binding on the plaintiff and that the defendants were not entitled to any compensation.

The defendants preferred a second appeal.

S. V. Palekar, for the appellants (defendants).—Under section 3 of the new Limitation Act (1908) the lower Courts should have thrown out the plaintiff's claim as time-barred. On the pleadings as set out in the plaint it is clear that the possession of the plaintiff's adoptive mother became adverse to him from the year 1894 when she drove him out of the house: *Bajrangi Singh v. Manokarnika Bakshi Singh*[1]. Under normal circumstances, that is, if the plaintiff had been a major at the time of his expulsion, the suit would have been barred in 1906. The fact that the plaintiff was only a child of ten years in 1894 does not make much difference in the situation in his favour. He became a major in 1902.

[1] (1907) 30 All 1.

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Rachava, that Rachava should enjoy the property during her life-time, that after Basappa's death in 1894, Rachava enjoyed the property till her death which took place in March 1907, that after Basappa's death Rachava began to ill-treat plaintiff and drove him away, that thereafter plaintiff lived with and was maintained by his natural father, that Rachava died about 2½ years before the filing of the suit on the 9th October 1909, that the defendants were in wrongful possession and set up two leases executed in their favour by Rachava in the year 1902, and that the leases were unauthorized and not binding on the plaintiff. Hence the suit.

The material portion of the deed of adoption relied on by the plaintiff was as follows :—

You are full owner of all the articles and estate as above after our death My kinsmen and the executors of my will (and) the administrators of my estate have no sort of right of ownership over this You alone are fully entitled to the rights to the extent to which we are entitled.

Defendant 1, who was the tenant of one of the lands, answered *inter alia* that he had no knowledge of the plaintiff's conditional adoption, that for the purpose of making improvements in the land Rachava let it out to the defendant in the year 1902 under a registered deed, that plaintiff was estopped by his acts and conduct during and after Rachava's life-time from disputing the defendant's lease, that Rachava made the lease as manager of the family for consideration and for protection of the property, that the defendant spent Rs. 450 in improvements, that the plaintiff was not entitled to maintain the suit, that if the plaintiff was entitled to file the suit, he must pay to the defendant the amount spent by him in making the improvements and must indemnify him for future loss and that the claim was time-barred under Article 91 of the Limitation Act.

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Defendant 3 was absent.

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S. V. Palekar, for the appellants (defendants):—Under section 3 of the new Limitation Act (1908) the lower Courts should have thrown out the plaintiff's claim as time-barred. On the pleadings as set out in the plaint it is clear that the possession of the plaintiff's adoptive mother became adverse to him from the year 1894 when she drove him out of the house: *Bajrangi Singh v. Manokarnika Bakshi Singh*[1]. Under normal circumstances, that is, if the plaintiff had been a major at the time of his expulsion, the suit would have been barred in 1906. The fact that the plaintiff was only a child of ten years in 1894 does not make much difference in the situation in his favour. He became a major in 1902.

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Under section 8 of the Limitation Act he cannot get more than three years from that date. So in the present case the suit would have been barred against his adoptive mother in 1906 at the latest. We claim through the adoptive mother, therefore, the suit as against us also became barred in that year. The suit was brought in the year 1909, that is, three years after it was barred according to the plaintiff's own admission in the plaint. The cause of action having become extinguished three years before the date of the suit, the lower Courts should have thrown out the suit. No doubt, we did not set up this plea of limitation in our defence but the provisions of section 3 of the Limitation Act are imperative. It lays down that a suit instituted "after the period of limitation prescribed therefor by the first schedule shall be dismissed although limitation has not been set up as a defence".

The result of the plaintiff's admissions in the plaint is sought to be neutralized by the adoption-deed, Exhibit 30. It is sought, on the strength of that document, to prove that the widow's possession from the year 1894 onwards was on behalf of her minor adopted son. But Exhibit 30 is not admissible in evidence being not registered. It was executed by the adoptive father of the plaintiff and it purported to give to his wife, that is, the plaintiff's adoptive mother a life-interest in the property. It is admitted that Exhibit 30 was executed some months after the adoption. The adoptive father, therefore, had no right to convey away the eight annas share in the property which vested in the adopted son from the moment of his adoption, whatever the father might have done with regard to the eight annas share which was still his own. But even such share he could not transfer except by a registered deed. The consequence is that Exhibit 30 is inadmissible in either case and cannot help the plaintiff.

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N. V. Gokhale, for the respondent (plaintiff):—The plaintiff was a minor in 1894. Therefore, the possession of his adoptive mother must be regarded as on behalf of her minor son: *Padapa* v. *Swamirao*[1]. Adverse possession must be proved by clear and positive evidence. It cannot be inferred from casual statements in the pleadings.

The defendants cannot be allowed to raise the plea of limitation in the manner they have done it now for the first time in second appeal. They did not urge it in the lower Courts.

Palekar, in reply:—The ordinary presumption that a widow's possession is on behalf of her minor adopted son cannot arise here, because the plaintiff admits that *his adoptive mother drove him out of the house in 1894* and managed the property in her own right.

As to limitation, section 3 of the Limitation Act is imperative and the lower Courts were bound to throw out the claim even if we did not raise the plea of limitation.

BEAMAN, J.:—In this case the plaintiff has sued to have certain leases, executed by his adoptive mother Rachava to the defendants, set aside The material facts are, that in January 1893 or thereabouts, the husband of the lessor and the lessor, being then man and wife without issue, adopted the plaintiff, with the consent of his natural father, and apparently shortly after the actual adoption executed a writing, Exhibit 30 in the case. That writing states that the adopting parents possessed certain property, and after their death the adopted son *is to obtain the whole of it. In 1894 the adoptive* father Basappa died. We have not unfortunately the exact date. According to the plaintiff's own statement in his plaint, within two or three months of the death of

[1] (1900) 24 Bom. 556.

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his adoptive father Basappa, his adoptive mother Rachava drove him out of the house, and from that time until her death in 1907 the plaintiff resided with his natural father or at any rate never returned to the home of his adoptive mother. In 1902 the lessor executed these two leases to the defendants. It was also in 1902 that the plaintiff attained his majority. In 1907 the lessor, that is to say, the widow, the adoptive mother of the plaintiff, died, and within three years of her death the plaintiff brought this suit to have the leases set aside as being alienations invalid beyond the life-time of the widow with the life-estate. Upon these averments, the lower Courts held that the widow was given a life-estate under Exhibit 30 and therefore that the plaintiff's suit was within time. We have felt ourselves unable to admit Exhibit 30 in evidence for want of registration. Once that paper is out of the case, the position is somewhat changed. A very neat point of limitation was then very neatly put to us by Mr. Palekar and it arises in this way. He contends that in law the effect of the plaintiff's adoption was to make him the sole heir of his father, the widow being entitled to nothing more than maintenance. But since in 1894 she drove the plaintiff out and thenceforward managed the property herself, her possession from that day unto her death in 1907 must be considered adverse to the plaintiff: see the decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[1]. Inasmuch as the plaintiff attained his majority in 1902 and adverse possession started in 1894, it is clear that the plaintiff would have been completely time-barred by the end of the year 1906 at the latest. Therefore he is not now in a position to question any of the acts done by his adoptive mother during that period. It is true that he is still her heir and would therefore retake the

(1) (1907) 30 All. 1.

property but would not be in a position to challenge any of the alienations made by her as of her absolute estate. This point of limitation does not appear to have occurred to any of the pleaders or learned Judges concerned with the trial upto the conclusion of the proceedings in the Court of first appeal. The only bar of limitation relied on by the defendants in the first Court appears to have been set up under Article 91 of the Ist Schedule of the Limitation Act and that would arise in this way. The leases having been made in 1902 and presumably to the plaintiff's knowledge, if he believed them to be in derogation of his rights as heir expectant, he ought to have brought the suit within three years of the date of the leases or after attaining his majority, whichever gave him most time. That period would have ended at the latest at the close of the year 1905. It will be observed that for the purposes of this argument, I have stated that the plaintiff was presumed to have known of the leases. The point however was early dropped and has not been pressed before us. At one time it appeared as though there might have been something in it, but having regard to the fact that actual evidence would have been required to show that the plaintiff had in fact known of the leases more than three years before suit and no evidence of that kind being apparently available, this would clearly be a matter into which we could not go in second appeal.

I shall now proceed to deal in some detail with the new point of limitation taken by Mr. Palekar. But, first, I must explain the reasons for which we have excluded Exhibit 30 from consideration. Regarded from the point of view of the adoptive father, we find it impossible to say that this paper could be his will, because, rightly analysed, it appears to reserve a life-interest to himself and after himself to his widow

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before giving the remainder absolutely to the plaintiff, and any instrument which confers or reserves a life-estate to the maker could hardly in strictness, we think, be called a will. Nor can it be said to be a gift *in presenti* to the widow. Even were it so, it would certainly require registration, so that in any view, except that of contract, it may be doubted whether this instrument creates any rights at all to which legal effect could be given. Now, there are many cases of a like nature in which similar writings appear to have been treated by the Courts in India and even by their Lordships of the Privy Council as contracts or *quasi* contracts between the adoptive widow of the one part and the natural father of the minor adopted, of the other. All those are cases of adoptions by widows and this is a different case because here the true adopter was of course the father, the widow having no right whatever during his life-time to prevent him adopting if he chose to do so. Nevertheless, even in the cases I have adverted to, analysis will, I think, reveal many difficulties. Speaking for myself, I have always found it most difficult to refer these instruments imposing conditions apparently upon an adopted minor logically to any true category of contract. If real contract, then it must be a contract between the natural father of the minor and the adoptive widow, the natural father representing his minor son and the resultant contract supposed to be for the benefit of the minor and on that account held to be binding upon him. But I think the very furthest that any such arrangement could be taken under the law of Contract would be that it would be open to the minor on attaining majority either to ratify or repudiate, so that if contracts at all, these conditions annexed to adoptions would be contracts only complete when ratified by the minor after attaining majority. But if the minor desired to ratify any such contract on attaining majority, the pre-existing contract would

obviously be nugatory, since it would clearly be open to him as an adult to confer upon his adoptive mother a life-estate, or, in other words, to abrogate so much of his full rights if he chose to do so. Nor is it easy to understand upon what ground the taking of a son in adoption can be regarded as consideration ; and when the matter is referred, as it usually is, to a future and expectant ratification, the invalidity of the whole argument becomes more apparent, since, while it is open to the minor to resile from his share of the contract, it is quite impossible for the widow to resile from hers. An adoption once made cannot be unmade. So that it would appear that these instruments of condition sometimes precedent to, sometimes contemporaneous with, sometimes subsequent to an adoption can hardly be regarded as true contracts. Nevertheless, when contemporaneous with or immediately precedent to and particularly when embodied in a deed of adoption, there can be no doubt, I think, now but that the law has agreed to accept and validate them. They then appear to stand upon some footing entirely peculiar to themselves. Thus the widow is said to be in law entitled to make any reasonable conditions at the time of adoption, such as, reserving to herself a life-estate, although that is utterly opposed to the resultant legal effect of an adoption upon the rights of the parties, and having done so that those conditions must be enforced as binding upon the adopted son. So that here had the adoption been made by the widow and this term incorporated in the deed of adoption or in any writing immediately precedent to or contemporaneous with it we should have felt it hard to say that it was not on all fours with similar writings which have been admitted and acted upon by the highest judicial authority without the need of registration. But having regard to the fact that the estate to be dealt with was at the time of the adoption

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not the widow's estate at all, it is clear that she at least had no power to make any reservations for her own benefit and in her own interest. Thus it comes out at last that whatever benefit was to be reserved to the widow under this adoption deed, must have been either by way of gift from her husband or by way of contract with the minor, and in any case quite clearly there was created in the widow an interest in the immoveable property which she otherwise would not have possessed and could not have possessed, and that interest exceeded in value Rs. 100 and was created by the instrument, Exhibit 30. I therefore think that that instrument requires registration and not having been registered is inadmissible in evidence for any purpose whatever affecting the property now in suit.

That leaves me now face to face with the point of limitation raised by Mr. Palekar on such facts as remain after the elimination of the explanatory paper, Exhibit 30, and it appears to me that his very clear and cogent argument would be conclusive but for one reply, and that reply, I think, in turn is equally conclusive. In the first place, I must not omit to notice that contentions of this kind taken for the first time in second appeal are usually viewed with considerable disfavour. It may very fairly be doubted whether a point of limitation like this involving as it does the character of the widow's possession does not really raise a question of fact which can only be answered upon evidence, and were that necessary to be taken, it is quite clear that we sitting in second appeal should be precluded at this stage from re-opening the enquiry at any point and inviting or discussing any further evidence. Mr. Palekar replies, however, that no evidence whatever is needed, that his point is a pure point of law arising upon the materials before the Court, not one of which is in dispute. At first I was disposed to think that the

widow's possession, from 1894 to 1902 when the plaintiff attained his majority, might be referred and therefore ought to be referred to her position as his natural guardian. But in view of the plaintiff's admission that she drove him from the house in 1894 since which time he has never resided with her, it certainly does appear to me to be sufficient in itself to negative the ascription of her possession to any such character as that of natural guardian. Still, it may be contended that the character of the possession remains undetermined in the absence of all evidence. Speaking here entirely for myself, I should be inclined to think that the admission of the plaintiff, were there nothing else in the case, would sufficiently indicate the character of the widow's possession, and if that were so, then all the legal consequences upon which Mr. Palekar insists would flow from that possession and the plaintiff would indubitably, in my opinion, have been completely time-barred at the close of the year 1906. Nor do I think that conclusion could be affected by the suggestion that all that the widow obtained by her adverse possession was a life-estate. For, after giving my most careful consideration to that point, I am utterly unable to understand or conceive any circumstances in which a widow could possibly acquire by adverse possession a merely limited estate of that kind. Adverse possession of the property would certainly give her absolute ownership, and absolute ownership being larger, would of course include the lesser estate. I repeat I cannot conceive any circumstances in which a person could set out consciously to acquire a limited within a larger estate by adverse possession, the natural legal consequences of which would be to confer the latter, *i.e.*, full ownership upon him So that I do not think that the respondents derive any advantage from that line of argument.

But I do think that although we have been obliged to exclude Exhibit 30 entirely from our minds as proof

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of any conditions annexed to the adoption of the plaintiff, I cannot ignore the very plain understanding which existed between the plaintiff and his mother as evidenced throughout the whole course of this trial in both the Courts below. *Looking to the pleadings,* looking to the contentions of the defendants themselves, there can be no doubt that the real truth is this, that the plaintiff believed that his adoptive mother was entitled to a life-estate under Exhibit 30. It is equally clear that the defendants dealt with her in the belief that she had a life-estate, and I think it is quite as clear that the widow herself was *really managing the property in the* like belief, namely, that she had obtained the estate under Exhibit 30. Now, if that was the true belief of the plaintiff and this adoptive mother, the widow, it would follow obviously that her possession so long as she lived would not be adverse to the plaintiff at any period, but merely permissive. That is to say, if the plaintiff honestly believed, though wrongly, that she was entitled to remain in possession for life and if she shared that belief and so remained in possession while he took no steps to disturb her, the principal ingredient in Mr. Palekar's case would be wanting, namely, the intention, to hold adversely in order to acquire an absolute estate, and it is upon that basis that I think the relief prayed for by the plaintiff in this appeal ought to be granted. For it follows that if I am so far right, the plaintiff allowed the widow a life-estate, and at the conclusion thereof in the year 1907 no question of limitation could arise either upon the old ground under Article 91 or upon the new ground so ingeniously taken and in my opinion so admirably argued by Mr. Palekar. I think too that the merits and justice of the case point the same way.

In my own opinion, therefore, for the reasons I have stated, the judgment of the Court below, though arrived at by a different process of reasoning, is substantially

right and this appeal ought to be dismissed with all costs.

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MACLEOD, J.:—I agree with the conclusion arrived at by my brother Beaman, but I would like to add a few words on the point raised by Mr. Palekar that the plaintiff's claim is time-barred on the ground that the possession of the widow from 1894 was adverse to him. There may be cases where admissions on the pleadings clearly show that the plaintiff's claim is barred under the Limitation Act, but it is very rarely that such admissions appear, and it is only in such cases that the point of limitation on the ground of adverse possession could be raised in second appeal. In this case there is only the allegation in the plaint that the widow some time after her husband's death had treated the plaintiff badly and driven him out of the house, and that the plaintiff did not thereafter return to live with the widow, his adoptive mother. That is not sufficient by itself to establish a case of adverse possession by the widow, if only because there is no date from which adverse possession is stated to have begun, and it would be necessary to adduce other evidence to show, not only that the widow possessed the property adversely to the interest of the minor adopted son, but also when such adverse possession began. As the plaint stands, it is quite possible that although the widow did not wish the minor to live with her, still she was willing to recognise his rights, and was willing to manage the property in his interest, or at the most, was desirous of enjoying the life-estate which was given her under the adoption-deed, while recognizing that the adopted son was entitled to the property after her death. So that before the Court could hold that the widow held adversely to the son, evidence would certainly have to be brought to show precisely that such possession was adverse. There is no evidence in this case, as the point was not even

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before the same went into the possession of the defendants after the year 1899, that the plaintiffs had not voluntarily given up possession of the land as contended by the defendants, that the defendants were not entitled to retain possession as against the plaintiffs and that the plaintiffs were entitled to recover Rs. 149 for mesne profits from defendants 2—4. He, therefore, passed a decree awarding the claim.

On appeal by the defendants the Assistant Judge found that a tenant (plaintiffs) who could not prove a right of permanent occupancy, could not recover possession after eight years on the strength of his previous possession and that the plaintiffs were not entitled to recover possession. The Assistant Judge, therefore, allowed the appeal.

The plaintiffs having preferred a second appeal, No. 913 of 1910, it was heard by Russell and Chandavarkar, JJ., who delivered the following interlocutory judgment and remanded the case for disposal according to law on the merits on the 28th November 1911.

PER CURIAM :—We cannot accept the findings of the Assistant Judge because he has not paid due regard to the pleadings, and his own findings are not in accordance with law and vague. He finds that the plaintiff was in possession till about eleven years ago as a tenant from year to year. He finds that the defendants have come into possession since then. There is no doubt that he has also held upon his view of the facts that the dispossession of the plaintiff by the defendants was not forcible, and to use a new word invented by the Judge 'wrongous'.

Now if the dispossession was not forcible, and if the plaintiff was ousted by the defendants in a lawful manner, because the defendants had a right to the possession, then we should have expected to find that the defendant had some title, and the Judge's finding

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about the defendants not having dispossessed wrongfully, to be based upon *some* title found by him in favour of the defendants. But at the same time the Assistant Judge says that it is unnecessary for the defendants to prove their title, and that because, in his opinion, the plaintiffs must first prove that the defendants' possession is wrongful; and he holds that the plaintiffs have not done this.

Now, where the plaintiff has been held to have been in possession till about eleven years ago as a tenant from year to year; where again it is found that the defendant has come into possession since then, by dispossessing him, the inevitable inference in law from these proved facts must be that the defendant has wrongfully dispossessed the plaintiff, unless the defendant is able to show that he has a better title to hold the land. This is in accordance with the rule of law which says that of two persons one of whom has been dispossessed by the other, the person dispossessed is entitled to be restored to possession, because if the dispossessor has proved no title and no right to possession, peaceable possession is some proof of title, where the question of title and the question of possession is doubtful. To this rule of law the learned Assistant Judge has paid no due regard. And further we should say that his mode of dealing with a case like this, which was disposed of on the merits fully by the Subordinate Judge, is a most unsatisfactory way of dealing with litigation. Here are parties who come into Court with disputes and ask the Court to decide between their conflicting titles. In effect Mr. Ferrers' language is *that: I do not know if the* plaintiffs have any title, but they were in possession till about 11 years ago when they were dispossessed by the defendants. I do not care what the defendants' title is, but all I can say is that the defendants have dispossessed, but the dispossession is not forcible, and

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The appeal was reheard on remand by the District Judge, Mr. Baker, who raised four issues as follows:— 1. Who has got the occupancy rights to the land? 2. Have defendants a better title? 3. What is the nature of plaintiffs' possession? 4. Whether the defendants have wrongfully dispossessed plaintiffs?

He held, quoting from the remand judgment, that the dispossession by the defendants appeared to be wrongful as they had not shown a better title than the plaintiffs saying that that disposed of issues 2 and 4 and that "as regards issues 1 and 3" the learned counsel for respondents says "plaintiffs do not prove their title and it is not necessary. As their Kaul is not proved there would be some difficulty in doing so. They may be taken to be tenants of the Swami of Chaphal, still they are entitled to possession as against defendants." He therefore dismissed the appeal with costs.

The case now comes up for the second time in second appeal.

This is a suit based upon title. It is not a possessory suit brought within six months of a wrongful dispossession but a suit against defendants who had been in possession for eight years. The presumption of right arising from possession applies as much to a defendant as to a plaintiff (see *Jowala Buksh* v. *Dharum Singh*[1]), and the fact of possession within twelve years of suit will not avail the plaintiff unless it is shown to be such a possession as gives a better title to the land than the defendants can show. See *Dharani Kanta* v. *Gabar Ali*[2]. To succeed in ejectment it is only necessary for

[1] (1866) 10 Moo. I A 511 at p. 528 [2] (1912) 15 Bom L. R. 445 at p. 451.

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the plaintiff to establish such title as carries a present right to possession. The Assistant Judge, Mr. Ferrers, having found the plaintiffs on failure to prove their title as permanent tenants to be only tenants from year to year, thought that so far as their previous possession was equivalent to title it was a title which was annual only and which for want of renewal had long ceased to be, but he failed to recollect that ordinarily unless there is an express agreement for the expiry of a tenancy on a certain day a tenancy from year to year is only determined by a notice to quit. He found, it is true, that the plaintiffs had withdrawn from the land but that finding for some reason, which does not appear on the remand judgment, was not accepted by the High Court. The District Judge, Mr. Baker, said that the alleged relinquishment of the land by the plaintiffs was to be received with great suspicion but only held that there had been a wrongful dispossession as a legal inference arising from the pronouncement in the remand judgment. It seems to us that upon the admitted facts it would be a reasonable inference that as the plaintiffs had not asserted their right as yearly tenants for eight years they must be taken to have abandoned the tenancy or to have relinquished such other occupancy rights as they might have and if so they would have no present right to possession such as would entitle them to maintain a suit for ejectment. The only cases cited to us as establishing the plaintiffs' right as yearly tenants to maintain ejectment were *Doe dem. Hughes* v. *Dyeball*[1] and *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar*[2] in which there was no delay by the tenant in suing the trespasser and therefore no possibility of such an inference as seems to arise in the present case.

Counsel for the appellants contends that on the facts found by the District Judge the plaintiffs have no title.

[1] (1829) 1 Mood. & Malk. 346 [2] (1884) 8 Bom. 371

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It is not disputed that the Inámdár of the land was the Swami of Chaphal and the plaintiffs attempted to prove a permanent lease by the Swami in their favour. The proof failed as the lease was held to be a forgery. The payments made by the plaintiffs for the land while their possession continued are held to have been made either to Ramchandra, the Khátedár, or to the village officers as assessment and not as rent. These facts, it is contended, show no tenancy by the plaintiffs and prove that the title is and was actually in the Swami. The defendants are entitled to rely on the *jus tertii* appearing from the facts adduced by the plaintiff to defeat his claim, see *Doe dem. Carter* v. *Barnard*[1]. Defendants' counsel also relies upon *Nagle* v. *Shea*[2] in which it was held that the defendant in ejectment might set up and prove *jus tertii*. Sir Frederick Pollock, in Pollock and Wright on Possession, p. 97, thinks this case conflicts with *Davison* v. *Gent*[3]. The passage in Bramwell B's judgment in that case is not clear owing to the equivocal use of the pronoun "he" but here at all events the plaintiffs' own case discloses the *jus tertii* and brings the case within *Doe dem. Carter* v. *Barnard*[1]. In this connection we may observe that *Jeffries* v. *Great Western Railway Company*[4], relied upon by the Court in *Ali* v. *Pachubibi*[5] to show that a *jus tertii* cannot be set up in a suit for possession, was an action in trover for chattels.

In our opinion the plaintiffs have failed to prove title, that is, a present right to possession of the land in suit.

There are, moreover, facts found which show that Raghunath Ramchandra was the plaintiffs' 'superior holder' as that term is defined by the Land Revenue Code, and in that capacity Raghunath Ramchandra got decrees in assistance suits against the plaintiffs in 1899

(1) (1849) 13 Q B. 945.
(2) (1874) 8 Ir R. C. L. 224.
(3) (1857) 26 L J. Ex. 122.
(4) (1856) 5 E. & B 802.
(5) (1903) 5 Bom L. R. 264.

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and 1900 under section 86 of that Code. It is no answer to say, as does the District Judge, that the decisions were *ex parte* and the plaintiffs did not appear. These proceedings together with the fact that Raghunath Ramchandra and since him the defendants have been the Khátedárs of the lands in suit are evidence of a title in the defendants which must prevail against the failure of the plaintiffs to prove any title.

We reverse the decree and dismiss the suit with costs throughout.

Decree reversed and suit dismissed.

G. B. R.

APPELLATE CIVIL.

Before Mr Justice Heaton and Mr Justice Shah

HARIBHAI HANSJI (ORIGINAL PLAINTIFF), APPELLANT, v. NATHUBHAI RATNAJI AND ANOTHER (ORIGINAL DEFENDANTS NOS 1 AND 2), RESPONDENTS.*

1913. October 14

Indian Contract Act (IX of 1872), section 65—Agreement discovered to be void—Compensation, payment of—Bhagdari Act (Bombay Act V of 1862)—Alienation of unrecognised sub-division of a bhag—Valatdani patta

In 1902, the plaintiff executed a *valatdana patta* of lands forming an unrecognised sub-division of a *bhag* in favour of defendants who were put in possession. The deed contained a personal covenant whereby the plaintiff bound himself to give compensation to the defendants in case their possession was obstructed. In 1910, the plaintiff sued to recover possession of the property by redeeming the *valatdana patta* which he alleged was a mortgage. The lower Courts held that the alienation was void under the provisions of the Bhagdari Act (Bombay Act V of 1862), and following the decision of *Jyibhai v. Naghi*[1] ordered that the plaintiff could recover possession on payment of moneys he had received from the defendants. The plaintiff having appealed:—

Held, that the order of compensation against the plaintiff was justified, inasmuch as the agreement was discovered to be void within the meaning of section 65 of the Indian Contract Act (IX of 1872) long after the transaction, and as there was a personal covenant in the agreement.

* Second Appeals Nos. 42 and 43 of 1913.

(1) (1909) 11 Bom. L. R. 693.

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Per Shah, J—Neither under section 65 of the Indian Contract Act nor under the ruling in *Jijibhai* v. *Nagji*(1) is the Court bound to award compensation in all cases as a matter of course where a document is found to be void in consequence of the provisions of the Bhagdari Act. It has to be considered in each case whether the agreement is discovered to be void and whether any person has received any advantage under such agreement as required by section 65 or whether the covenant in each particular case justifies the order of compensation. The amount of compensation also has to be determined with reference to the circumstances of each particular case

SECOND appeal from the decision of Mohanrai Dolatrai, First Class Subordinate Judge with Appellate Powers, at Broach, modifying the decree passed by C. M. Jhaveri, Joint Second Class Subordinate Judge, at Broach.

Suit to redeem a mortgage.

The plaintiff executed a *valatdana patta*, on the 10th June 1902, in favour of the defendants in respect of his lands which formed an unrecognised sub-division of a *bhag*. The deed in question contained a personal covenant whereby the plaintiff undertook to indemnify the defendants in case their possession was obstructed.

In 1910, the plaintiff sued to redeem the *valatdana patta* after taking accounts under the provisions of the Dekkhan Agriculturists' Relief Act, 1879, and to recover possession of the lands.

The Subordinate Judge held that the *valatdana patta* in suit was a mortgage; that it was void under the provisions of the Bhagdari Act (Bombay Act V of 1862); and that the plaintiff was entitled to recover possession of the lands, only on payment of Rs. 367, the amount he had received under the transaction. The amount carried interest at 6 per cent. and was made payable in six equal annual instalments.

On appeal, the lower appellate Court made a variation in the provision about interest, but in other respects, confirmed the decree on the following grounds :—

(1) (1909) 11 Bom. L R 693.

Plaintiff's (appellant's) pleader seems, however, to think that this restoration should have been ordered in his favour without his being called upon to pay anything to the contending defendant as the bonds were so void but there the ruling in 11 Bom. L. R. 693 is a clear authority for holding that even in cases of transactions so void *ab initio* the defendant ought not to be ordered to give up the lands without receiving back his moneys.

Plaintiff has himself been a party to the illegality and it is but just that the *status quo* ought to be restored only on equitable terms

It seems but equitable therefore that the plaintiff must make due amends to the defendant before claiming restoration under his own unlawful act, and I am not prepared to hold therefore that the lower Court was at all wrong in directing the plaintiff to make a certain refund to the defendant as consideration passed to him under the impeached transaction

The plaintiff appealed to the High Court.

G. N. Thakore, for the appellant :—Section 65 of the Indian Contract Act applies only where the transaction is 'discovered to be void.' It has no application to the present case where the alienation being of an unrecognised sub-division of a *bhag* is void *ab initio*. The cases of *Ramchandra* v. *Jairam*(1), *Jijibhai* v. *Nagji*(2), *Mohori Bibee* v. *Dharmodas Ghose*(3) and *Dayabhai Tribhovandas* v. *Lakhmichand Panachand*(4), referred to.

N. K. Mehta, for the respondent .—This case is fully covered by *Jijibhai* v. *Nagji*(2). The defendant is entitled to compensation either under section 65 of the Indian Contract Act or under the covenant under the mortgage-deed. *Gulabchand* v. *Fulbai*(5), referred to.

SHAH, J. :—In this case the plaintiff sued formally to redeem but substantially to recover possession of the property mentioned in the *ratatdan patta* dated the 10th of June 1902. Several defences were raised to this suit on behalf of defendant No. 1 It was held by the trial Court that the document called the *ratatdan patta*

(1) (1897) 22 Bom 686 at p 691
(2) (1909) 11 Bom L. R 693
(3) (1903) 30 Cal 539
(4) (1885) 9 Bom 358
(5) (1909) 33 Bom 411

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was a mortgage, that the plaintiff was entitled to recover possession, and that he was liable to give certain compensation to the defendant as claimed by him. The decree of the trial Court was confirmed subject to a slight variation as to interest by the lower appellate Court.

The plaintiff has now appealed and has urged that the order of the lower Court allowing compensation to the defendant is wrong, firstly because the bond is void under section 257A of the Code of Civil Procedure of 1882, and secondly because the bond is void in virtue of the provisions of the Bhagdari Act. It is contended that no compensation under section 65 of the Indian Contract Act should be allowed, as it must be assumed, in the absence of any evidence to the contrary, that at the time when the agreement was entered into, the parties were aware of the real nature of the transaction.

As to the first point, from the recitals in the document, the amount of the bond does not appear to be in excess of the decretal amount. There is no evidence in the case to show that at the date of the bond the amount due under the decree was less than the amount of the bond. The appellate Court has observed that in this case the bond appears to have been taken for 'far shorter amount.' Under these circumstances I am of opinion that the bond is not proved to be void in virtue of section 257A in this case. It is not necessary, therefore, to consider the question whether compensation under section 65 of the Contract Act could be allowed, if the bond were void under section 257A.

As regards the second point the facts are that the defendant obtained possession of the property from the date of the bond and continued in possession up to the date of the suit. The plaintiff brought the suit in 1910 to recover possession of the property. Until then it appears that no obstruction was caused to the defend-

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ants' possession under the bond. The plaintiff thought of recovering possession on the ground that the mortgage of an unrecognized portion of a *bhag* was void in this suit. There is nothing to show that the defendant was aware of the fact that the bond was void under the Bhagdari Act at the date of the bond. It is clear that the bond was discovered to be void after the suit was brought. Assuming for the sake of argument that the plaintiff's contention that section 65 of the Contract Act has no application to a case, in which the parties are aware at the time of the transaction that it is void, is good, I am of opinion that in this case the agreement is discovered to be void within the meaning of section 65 of the Contract Act long after the transaction. It is clear that if the agreement is discovered to be void, it is open to the Court to allow compensation to the person to the extent of the advantage received under such agreement by the other side. In this case we have the additional circumstance that there is a personal covenant in the bond to give compensation in case there is any hindrance caused to the possession of the defendant under the bond. I am of opinion that even under this covenant the order of compensation against the plaintiff would be justified This view is supported by the ruling in *Jijibhai* v. *Nagji*[1]. The lower appellate Court appears to have thought that in view of *Jijibhai's* case, the defendant ought not to be ordered to give up the lands without receiving back his moneys. It is necessary, however, to remember that neither under section 65 of the Indian Contract Act nor under the ruling in *Jijibhai's* case is the Court bound to award compensation in all cases as a matter of course where the document is found to be void in consequence of the provisions of the Bhagdari Act. It has to be considered in each case whether the agree-

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ment is discovered to be void and whether any person has received any advantage under such agreement as required by section 65 or whether the covenant in each particular case justifies the order of compensation. The amount of compensation also has to be determined with reference to the circumstances of each particular case. In the present case there is no dispute about the amount. The parties were agreed in the lower Courts that if the compensation could be awarded to the defendant, the amount should be that which is allowed by the lower Courts. Under the circumstances of this case I feel satisfied that both under section 65 as also under the covenant contained in the bond the order as to compensation is correct.

Lastly, having regard to the variation in the terms of the decree of the Court of first instance made by the lower appellate Court, the effect of which is not quite clear to us and which is likely to lead to complication in calculation, I am of opinion that it is desirable to restore the decree of the trial Court. That decree allows interest in a manner which under the circumstances of this case, I think, is fair. The difference between the decree of the trial Court and that of the appellate Court, as I understand it, is not of a very substantial character, and even in the absence of any cross-objection on the part of the defendant, I think under the circumstances it would be proper to restore the decree of the trial Court.

I, therefore, modify the decree of the appellate Court by restoring that of the trial Court subject to the proviso that the first instalment, if not paid, should be paid by the 31st of December 1913, the time for the payment of other instalments being the same as fixed by the decree of the trial Court.

The appellant should pay respondent No. 1's costs of this appeal and of the appeal in the District Court.

HEATON, J. :—I concur in the decree which is to be made and I have very little to add. I do think it necessary to point out that apparently on the strength of the case of *Jijibhai* v. *Nagji*[1] there is a tendency to assume that because an agreement is in fact void, it follows without more ado that it is discovered to be void within the meaning of section 65 of the Contract Act. Personally I do not think that any such thing necessarily follows. As my learned colleague indicates, in every case the circumstances of the case have to be looked to, and it has to be determined whether in that particular case section 65 of the Contract Act can properly be applied.

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Decree modified.

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[1] (1909) 11 Bom. L. R. 693.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

S. AMERCHAND & CO. (APPELLANTS AND 2ND DEFENDANTS) v. RAMDAS VITHALDAS DURBAR (RESPONDENT AND 1ST DEFENDANT).*

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AND

CHHAGANLAL PITAMBER (APPELLANTS AND 2ND DEFENDANTS) v. RAMDAS VITHALDAS DURBAR (RESPONDENT AND 1ST DEFENDANT).†

Contract Act (IX of 1872), sections 4, 61 and 103—Transfer of Property Act (IV of 1882), section 137—Stoppage in transit—Instruments of title—Railway receipts, effect of assignment of.

A, from Bagalkote, consigned to B at Bombay certain consignments of bales of cotton. These consignments A entrusted to the Madras and Southern Mahratta Railway at Bagalkote for conveyance to Bombay which was effected

* Suit No. 668 of 1911. Appeal No. 4 of 1912.
† Suit No. 670 of 1911. Appeal No. 7 of 1912.

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by rail as far as Murmagoa on the lines of that Company and afterwards from Murmagoa to Bombay by sea by ships of the Bombay Steam Navigation Company. The Railway Company issued in respect of these consignments receipts to A which A handed over to B as the consignee of the goods in exchange for hundies for the amount of the value of the goods drawn by B in favour of A These Railway receipts contained *inter alia* the following condition —

"That the Railway receipt given by the Railway Company for the articles delivered for conveyance must be delivered up at destination by the consignee to the Railway Company or the Railway may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery

"If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may at the discretion of the Railway Company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Company."

While the goods were in transit and in the possession of the Bombay Steam Navigation Company B became insolvent and some of the hundies given by him to A in respect of the goods in transit were dishonoured A thereon purported to stop the goods and gave the Steamship Company instructions not to deliver them to B but to C

In the meantime B had borrowed monies from D and E and had transferred to D and E respectively the Railway receipts for certain of these consignments as security On the arrival of the bales at Bombay they were claimed by D and E respectively and also by C.

The Bombay Steam Navigation Company filed two suits, one against A, B and D and the other against A and E claiming that the defendants in each suit might be restrained from taking proceedings against the plaintiff Company in relation to the bales and that the defendants in each suit might be required to interplead together concerning their claim to the goods in question in such suit

Held, that reading section 103 of the Contract Act in conjunction with section 137 of the Transfer of Property Act (as provided for by section 4 of the Transfer of Property Act) Railway receipts must be taken to be mercantile documents of title fulfilling one or other of the conditions specified in the explanation to section 137 of the Transfer of Property Act, viz., proving in the ordinary course of business the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented, and that

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under the third condition of the Railway receipts in question it was clear that those documents fell under the latter class.

Great Indian Peninsula Railway Company v. *Hanmandas Ramkison and Virji Hansraj*[1], not followed.

Simultaneously with these suits D had filed a suit against A and B to recover the monies advanced by him against the Railway receipts transferred to him. Subsequently the entries in the general account of B in D's books showed that various sums were credited to B which, if the rule laid down in section 61 of the Contract Act were applied, would extinguish that debt.

Held, that the intention of D as indicated by his suit to enforce his claim against the proceeds of the bales of cotton covered by the Railway receipts in question negatived the application of the rule.

Held, accordingly, that D and E were respectively entitled to the benefit of section 103 of the Contract Act as against A and, the bales having been sold, that the persons in whose hands the sale-proceeds were should hand over the net sale-proceeds to D and E deducting any charges justly due.

CHHAGANLAL Kalidas and Lilachand Kalidas were brothers and carried on business in partnership in Bombay as cotton merchants under the name of Chhaganlal Kalidas. In or about April 1911 the firm through Lilachand Kalidas purchased cotton from the firm of Ramdas Vithaldas Durbar at Bagalkote in the Bijapur District. The course of business was that the cotton was kept in the custody of the firm of Ramdas Vithaldas Durbar before being despatched to Bombay to which place it was conveyed by rail by the Madras and Southern Mahratta Railway Company as far as Murmagoa and thence to Bombay by the ships of the Bombay Steam Navigation Company. When the goods were railed the Railway Company made out receipts for them in the name of the firm of Ramdas Vithaldas Durbar as consignors and in the name of the firm of Chhaganlal Kalidas as consignees and issued the same to the consignors who delivered them to the consignees in exchange for hundies for the value of the goods drawn

[1] (1889) 14 Bom. 57.

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in their favour and payable on demand. One of the conditions of the Railway receipts was to this effect :—

3. That the Railway receipt given by the Railway Company for the articles delivered for conveyance must be given up at destination by the consignee to the Railway Company or the Railway may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery.

If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may at the discretion of the Railway Company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Company

Besides other consignments the firm of Ramdas Vithaldas Durbar in the manner above mentioned forwarded on the 24th of July 1911 a consignment of 73 bales, and on the 28th of July 1911, two consignments of 100 and 35 bales of cotton respectively to Chhaganlal Kalidas and obtained and handed over to the latter the Railway receipts for such consignments in return for hundies for the value of the goods

The firm of Chhaganlal Kalidas thereon borrowed Rs. 8,800 from the firm of Chhaganlal Pitamber and as security assigned to the latter the goods covered by one of the Railway receipts, namely, the consignment of 73 bales and transferred to them the Railway receipt. The same firm also borrowed Rs. 15,000 from the firm of S. Amerchand & Co., and as security assigned to the latter the goods covered by two of the Railway receipts, namely, the two consignments of 100 and 35 bales and transferred to them the Railway receipts.

Subsequently the firm of Chhaganlal Kalidas became insolvent and the hundies given by them in respect of these three consignments of cotton were dishonoured by them The firm of Ramdas Vithaldas Durbar thereon attempted to stop the consignments in transit and gave instructions to the Bombay Steam Navigation Company,

who were in possession, to deliver to Gangaram Chabildas and not to the insolvent firm.

On the arrival of the consignments at Bombay they were claimed by Gangaram Chabildas as the nominee of the consignors and the firms of Chhaganlal Pitamber and S Amerchand & Co. respectively claimed the goods of which the Railway receipts had been transferred to them as the assignees for value of the goods from the firm of Chhaganlal Kalidas.

The Bombay Steam Navigation Company filed two suits, one against the firms of Ramdas Vithaldas Durbar and S. Amerchand & Co., and Chhaganlal Kalidas and Lilachand Kalidas in respect of the two consignments of 100 bales and 35 bales of cotton, and the other against the firms of Ramdas Vithaldas Durbar and Chhaganlal Pitamber in respect of the consignment of 73 bales of cotton, in each suit praying *inter alia* that the defendants might be restrained by injunction from taking proceedings against the plaintiff Company in relation to the said consignments, and that the defendants might be required to interplead together concerning their claim to the consignments.

After the suits were filed the firm of Ramdas Vithaldas Durbar carried on both suits as if they had been the plaintiffs and the nominal plaintiffs took no further active steps in the suits

The suit against the firms of Ramdas Vithaldas Durbar and S. Amerchand & Co., and Chhaganlal Kalidas and Lilachand Kalidas came on for hearing before Mr. Justice Macleod who held that the firm of Ramdas Vithaldas Durbar was entitled (whether regarded as factors or quasi-vendors) to stop the consignments as against the consignees

On the question as to how far the right of the consignors was affected by the transfer for value of the

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Railway receipts for the consignments by the consignees to the firm of S. Amerchand & Co., the learned Judge held as follows :—

It remains to consider what was the effect of the endorsement and delivery by defendant 3 of the Railway receipts for the 135 bales to the 2nd defendant to secure an advance of Rs 15,000

Condition 3 on the back of the Railway receipts is as follows (reads it)

It will be noticed that this condition contemplates delivery only to the consignee or his endorsee as his agent if he is unable to attend to take delivery It does not even contemplate the sale of the consignment of the Railway receipt and endorsement of the Railway receipt to the purchaser as the Railway receipt did in the *G I P Railway Company* v *Hanmandas*(1), so that there can be no doubt that the Railway receipts in suit are not instruments of title within the meaning of section 103 of the Contract Act It was contended that Railway receipts are now instruments of title by virtue of section 137 of the Transfer of Property Act which has been applied to Bombay since the decision in *G I P Railway Company* v *Hanmandas*(1). The last chapter of the Transfer of Property Act deals with the transfer of actionable claims and after it has been enacted how such claims are to be transferred section 137 says that nothing in the preceding section applies to stocks, shares, etc., or to any mercantile document of title to goods The explanation says 'the expression mercantile document of title to goods includes a bill of lading, Railway receipt etc

Railway receipts are therefore excepted from the provisions of that chapter, but it cannot be argued from that circumstance that the Legislature has definitely enacted that Railway receipts are instruments of title within the meaning of section 103 of the Contract Act

If that was the case Sargent, C J, would have said in the last paragraph of his judgment that all that was required to satisfy the wishes of the commercial community was to make the Transfer of Property Act applicable to Bombay.

But it was argued that by the custom of the trade the title to the goods covered by the Railway receipts passed by endorsement and delivering of the receipt for valuable consideration

A custom was proved in *G. I. P. Railway Company* v *Hanmandas*(1) to prevail amongst merchants in Bombay engaged in the grain trade that Railway receipts endorsed from one holder to another were considered as representing the goods and entitling the last endorsee to delivery (see paragraph 13 of the case stated by the Chief Judge of the Small Causes Court, but the appeal Court held that that did not affect the rights of an unpaid vendor to stop the goods in transit.

(1) (1889) 14 Bom. 57.

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Assuming for the purposes of my judgment that a custom has been proved that in Bombay Railway receipts do pass amongst merchants by endorsement and delivery and that Railway receipts so endorsed are considered as representing the goods, I am bound by the decision in the abovementioned case to hold that the endorsement and delivery of the Railway receipts to defendant 2 could not affect the right of defendant 1 to stop the goods.

A custom prevailing amongst buyers in Bombay cannot make a Railway receipt negotiable as against the vendors if it is not negotiable at law. There seems to be a considerable confusion of thought involved in such a contention. A relation of contract is established between the vendor and the purchaser and the terms of the contract depend on what has been agreed upon between them and not on a custom which may prevail amongst purchasers in general and the persons with whom they deal.

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The firm of S. Amerchand & Co. appealed against this judgment.

The suit against the firms of Ramdas Vithaldas Durbar and Chhaganlal Pitamber came on for hearing before Mr. Justice Beaman. After some evidence had been taken, in view of the decision in the other case the firm of Chhaganlal Pitamber agreed to take a decree *per invitum* on the basis of the decree of Mr. Justice Macleod and to await the result of the appeal against that learned Judge's decision. A decree was given in that suit accordingly in favour of the firm of Ramdas Vithaldas Durbar.

The firm of Chhaganlal Pitambar appealed against this judgment.

The appeal filed by the firm of S. Amerchand & Co. came on for hearing on the 2nd and 3rd of September 1912 and subsequently by an order of the appellate Court, dated the 13th of September 1912, the suit was remanded to the Court below for the purpose of recording evidence on the following issues which had been framed in the lower Court :—

7. Whether the 2nd defendant advanced in good faith Rs. 15,000 on the terms set in paragraph 4 of his written statement and whether the Railway receipt in respect of the 135 bales was not duly assigned and transferred to the 2nd defendant on security for repayment of the said sum

8. Whether the 1st defendant was not aware that it was the usual course of business of defendants 3 and 4 to raise money by pledging the Railway receipt for the goods covered by them

9. Whether by the custom of the trade Railway receipts are not treated as instruments of title to the goods covered by them within the meaning of section 103 of the Contract Act.

Further evidence was accordingly recorded on these issues by Mr. Justice Macleod who on the 17th of December 1912 delivered a judgment on remand in which he recorded the following findings on the issues in question :—

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I find on issue 7 that the 2nd defendant advanced in good faith Rs. 5,000 and that the Railway receipts for the 135 bales were endorsed to them as security for the general balance due to them in account by defendants 3 and 4 including the 15,000 rupees

I find on issue 8 that the 1st defendant was not aware that it was the usual course of business of defendants 3 and 4 to raise money by pledging the Railway receipts for the goods covered by them.

The 2nd defendant therefore has failed to produce evidence of a single instance of the usage which they have attempted to set up being acted upon It is contrary to positive law and the cotton merchants and commission agents are perfectly made aware of that. If such an usage did exist and had been acted upon evidence must have been forthcoming considering that advances to the extent of crores must be made by commission agents against Railway receipts during a single season. The question whether Railway receipts are instruments of title by trade usage stands exactly where it did in 1889 Merchants think that Railway receipts ought to be made instruments of title by statute. They know that without legislation there is always a risk where they make advances against Railway receipts But by the exercise of a little care and by paying attention to ordinary business principles that risk can be made infintesimal They are obliged to take that risk if they want to do business but they know they have to be careful to take endorsements only from persons who are known to be responsible and substantial That this care is exercised is abundantly clear from the evidence I find issue 9 in the negative

The appeals in the two suits came on for hearing on the 18th, 25th and 27th of March 1913.

Mulla, with him *Setalwad*, for the firm of S. Amerchand & Co., appellants in Appeal No. 4 of 1912.

Strangman, with *Jinnah*, for the firm of Ramdas Vithaldas Durbar, respondents in Appeal No. 4 of 1912.

Desai, with him *Setalwad*, for the firm of Chhaganlal Pitamber, appellants in Appeal No. 7 of 1912.

Jinnah, with him *Bahadurji*, for the firm of Ramdas Vithaldas Durbar, respondents in Appeal No. 7 of 1912.

C. A. V.

The judgment of the Court was delivered by

SCOTT, C. J. —In both these appeals the appellant is an endorsée of a Railway receipt from the firm of Chhaganlal Kalidas who purchased the cotton bales men-

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tioned in the receipts from Ramdas Vithaldas of Bagalkote.

Chhaganlal Kalidas having become insolvent Ramdas Vithaldas, as unpaid vendor, stopped the cotton in the hands of the Bombay Steam Navigation Company before it had been delivered to the respective endorsees. In each case the Steamship Company has interpleaded. The first question in each case is whether the endorsee made the advance which he seeks to recover specifically upon the Railway receipt or receipts.

In Appeal No. 7 the fact of such advance is not disputed but in Appeal No. 1 it is contended that the advance of Rs. 15,000 was not made specifically against the two Railway receipts for 135 bales because the advance is entered in the general account of Chhaganlal and the proceeds in ordinary course would have been held as security not only for the advance of Rs. 15,000 but also for any general balance of account. But it is quite clear from the evidence that the appellant declined to advance the Rs. 15,000 until the Railway receipts were endorsed as security as a large sum was already due on the account. We cannot doubt that the endorsing of the Railway receipts as security was what induced the advance and that the advance was, therefore, made specifically upon them.

It is not disputed that in each case under appeal the advance was made in good faith.

In Appeal No. 1 it is further contended that the advance has been repaid before decree.

The facts are that on the 15th August 1911, *i.e.*, simultaneously with the Steamship Company's interpleader suit, the appellant filed a suit against the respondent Ramdas Vithaldas and also against the endorser to recover the Rs. 15,000 advanced against the Railway receipts. Some months later the entries in the

general account of Chhaganlal in the appellant's books show that various sums were credited to the latter which, if the rule in *Clayton's case*[1] and the rule of section 61 of the Contract Act were applied, would extinguish the debt of Rs. 15,000; but the application of the rule is always subject to the condition that the parties have indicated no intention inconsistent with its application.

It is clear from the appellant's suit that he intended to enforce his claim for the Rs. 15,000 against the proceeds of the 135 bales of cotton covered by the Railway receipts in question. This is sufficient indication of intention to negative the application of the rule.

It was further suggested that the rule in *In the matter of Westzinthus*[2] should be applied by marshalling any surplus assets in favour of the unpaid vendor, Ramdas, in the event of the question as to the applicability of section 103 of the Contract Act being decided against him. But the simple answer is that there are no surplus assets.

The question common to both appeals remains to be dealt with: Are the Railway receipts instruments of title within the meaning of section 103?

The Railway receipts are issued by the Madras and S. M. Railway Co. in the following form:—

The Madras and Southern Mahratta Railway Company Limited

RECEIPT

From Bagalkote to Bombay H. R. on B. S. N. Railway *via* M. R. H.

Sender's name, Ramdas Vithaldas. To whom consigned, Chhaganlal Kaladas.

Then follows a tabular statement of particulars relating to the goods, below which it is stated "these goods are accepted for conveyance subject to the conditions printed on the back herein".

(1) (1816) 1 Mer. 572 at p. 608. (2) (1833) 5 B. & Ad. 817.

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Condition 3 is as follows:—

"That the Railway receipt given by the Railway Company for the articles delivered for conveyance must be given up at destination by the consignee to the Railway Company or the Railway Company may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery

If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may at the discretion of the Railway Company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Company"

The 9th condition provides that the goods should be subject to the rules and conditions printed in the Railway Company's Goods Tariff and to the rules and regulations and wharfage and other charges in force on such railways and shipping lines over which they might be conveyed.

The holders of the Railway receipts in each case presented them not to the Railway Company which issued them but to the Bombay Steam Navigation Company which was the shipping line by which the goods were conveyed during the last part of the transit, *i. e.*, from Murmagoa to Bombay. The Railway receipt was a document under which the goods were received for a mixed transit by land and sea. There can be no doubt that in America such a document would be treated as, and probably called, a bill of lading: see *St. Louis, Iron Mountain and Southern Railway Company* v. *Knight*[1], where the Court after stating the nature and effect of a bill of lading said: "The doctrine is applicable to transportation contracts made in that form by Railway Companies and other carriers by land as well as carriers by sea." This point was taken by Mr. Robertson in the

[1] (1887) 122 U. S. R. 79 at p. 87.

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lower Court but the Judge said: "The document is a Railway receipt and cannot become a bill of lading because the Railway Companies employed the Bombay Steam Navigation Company to carry the goods for part of the distance." I understand that the learned Judge meant only that the document would not be a bill of lading within the meaning of section 103 of the Contract Act, so that its assignment to a pledgee would defeat the unpaid vendor's right of stoppage in transitu. But according to section 103 it is not only a bill of lading but any other instrument of title to goods which may be assigned with the same effect as results from the assignment of a bill of lading, and it is material to remember that the transit from Bagalkote to Bombay *via* Murmagoa is a transit identical in its nature for part of the distance with the transit of goods shipped by a consignor in Murmagoa under a bill of lading for delivery in Bombay; and I think that for this reason, on the special facts of these cases, the Railway receipt if assignable by endorsement would be an instrument of title to the goods under section 103 of the Contract Act. It is true that in *Great Indian Peninsula Railway Company* v. *Hanmandas Ramkison and Virji Hansraj*[1], it has been held a Railway receipt transferable by endorsement by the terms of the contract was not an instrument of title within the meaning of section 103 That was a case of conveyance by land from Bijapur to Bombay and in that respect the element of voyage by sea under a combined receipt and contract issued by the carrier was absent. It is also important to note that since the date of that decision the chapter of the Transfer of Property Act relating to the assignment of contractual claims has been recast and is now applicable to the Bombay Presidency. By section 137 it is provided that—

(1) (1889) 14 Bom. 57

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Nothing in the foregoing sections of this chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation.—The expression "mercantile document of title to goods" includes a bill of lading, dock-warrant, warehouse-keeper's certificate, Railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

This is one of the sections of the Transfer of Property Act relating to contracts which under section 4 is to be taken as part of the Indian Contract Act. We have, therefore, an express statement by the Legislature that Railway receipts shall be taken to be mercantile documents of title fulfilling one or other of the two specified conditions, *viz.*, proving in the ordinary course of business the possession or control of goods, or authorising or purporting to authorise either by endorsement or by delivery the possessor of the document to transfer or receive the goods thereby represented. Under the third condition of the Railway receipts in these cases it is clear that the documents fall under the latter class. The significance of the division into two classes of mercantile documents of title mentioned in section 137 of the Transfer of Property Act (which with the exception of its reference to Railway receipts is taken verbatim from section 4 of the English Factors Act of 1842 and reproduced in the Factors Act of 1889, section 1 (4), and applied in the Sale of Goods Act, 1893, section 62) is explained by the following passage from Blackburn on Sale, second edition, at page 415 :—

'There have been some attempts made to give the same effect to the indorsement of dock warrants, wharfingers' receipts, delivery orders, and similar documents, as is given to the indorsement of a bill of lading.

Those documents are generally written contracts, by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to

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deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that when goods are at sea the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore."

It was perhaps this distinction that the Court had in mind in *Great Indian Peninsula Railway* v. *Hanmandas Ramkison and Virji Hansraj*[1] when declining to apply, as Mr. Justice Farran had done, the English definition to "instruments of title" in section 103 of the Contract Act although admitting that it might be applied to the expression "document showing title" in section 108 on the ground that dealings by factors entrusted with documents showing title were a different subject-matter to assignments of instruments of title by the buyer of goods in transit.

It is clear that no distinction can be drawn from the difference of wording as in section 102, which also relates to assignments by the buyer during transit, the expression used is "document showing title".

It seems to me that section 137 of the Transfer of Property Act puts an end to the question. It recognises that since the passing of section 15 of the Sale of Goods Act, 1893, in England there is no force in the distinction drawn by Sir Charles Sargent in *Great Indian Peninsula Railway Company* v. *Hanmandas Ramkison and Virji Hansraj*[1]. It is to be noted that sections 102 and 103 are the only sections of the Contract Act which refer to assignment of documents of title and that section 137 of the Transfer of Property

[1] (1889) 14 Bom. 57.

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Act which must be taken as part of the Contract Act occurs in the chapter relating to the assignment of claims.

I am of opinion, therefore, that the appellants in each of these appeals are entitled to the benefit of section 103 of the Contract Act against the unpaid vendor.

In Appeal No. 4 of 1912, the case was remanded to the lower Court for evidence upon certain issues of which issue 9 was:—

Whether by the custom of the trade Railway receipts are not treated as instruments of title to the goods covered by them within the meaning of section 103 of the Contract Act

The evidence recorded as to the custom of merchants regarding Railway receipts is very much to the same effect as that recorded in *Jethmal* v. *B. B. & C. I. Railway*[1], the effect of which was stated by Tyabji, J., as follows:— .

"There is a great deal of evidence to show that there is a general practice prevailing amongst merchants and commission agents in Bombay to treat Railway receipts as documents of title, representing the goods mentioned therein, upon which advances can be obtained to the extent of 80 or 90 per cent. of the value, that these receipts are usually endorsed in blank by the consignee and that such endorsements are recognised by the Railway Companies in Bombay and delivery is given accordingly"

Mr. Justice Macleod thus states the result of the evidence taken on remand .

"The buyer's name appears in the Railway receipt and as a rule he advances to the vendor 80 or 90 per cent of the value of the cotton when he gets the Railway receipt, but some contracts, mostly those for Bengal cotton, are made on Railway terms by which it is meant that the buyer contracts to advance 90 per cent as soon as he gets the Railway receipt. Such receipts pass from hand to hand by endorsement and the evidence shows that buyers consider that the Railway receipt gives them a title to the goods though as a matter of fact they take care to see that their endorser is a respectable person

(1) (1901) 3 Bom. L. R. 260 at p. 263

Commission agents advance from 80 to 90 per cent on Railway receipts. Their constituent is either up country in which case no question of unpaid vendor arises, or a holder of a Railway receipt in Bombay who endorses it over to them. None of the second defendant's witnesses lent money on Railway receipts merely to earn interest. This, as far as the evidence goes, is only done by the Banks and they invariably require the cotton to be the Banks' Jetha or godown as security for the advance. It has then been proved, as was proved in *G.I.P. Railway Co.* v. *Hanmandas*[1], that amongst merchants and commission agents dealing in cotton in Bombay, Railway receipts endorsed by one holder to another are considered as representing the goods and entitling the last endorsee to delivery. But it does not follow from that that there is a usage that the last endorsee is entitled to delivery as against an unpaid vendor who stops the goods in transit."

In connection with this last observation we may refer to the judgment of Ashhurst, J., in *Lickbarrow* v. *Mason*[2]:

"The assignee of a bill of lading trusts to the indorsement, the instrument is in its nature transferable, in this respect therefore this is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only: but he has made it an indorsable instrument. So it is like a bill of exchange, in which case, as between the drawer and the payee the consideration may be gone into, yet it cannot between the drawer and an indorsee: and the reason is, because it would be enabling either of the original parties to assist in a fraud. The rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed, but the effect of that indorsement is a question of law."

The learned Judge has overlooked the form of the issue remanded which is, whether by the custom of the trade Railway receipts are not treated as instruments of title to the goods covered by them within the meaning of (*i. e.*, in the sense in which that expression is used in) section 103 of the Contract Act. The result of the Railway receipt being such an instrument of title as against the unpaid vendor does not depend upon custom but is a matter of law which is stated in the section.

(1) (1889) 14 Bom. 57. (2) (1787) 2 T. R. 63 at p. 71.

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For all the above reasons I am of opinion that the decision of the lower Court in Appeal No. 4 should be reversed; and for the reasons based both upon the special facts of the case and on section 137 of the Contract Act I am of opinion that the decision of the lower Court in Appeal No. 7 should also be reversed. In each case the unsuccessful respondent must pay the costs throughout, except that in Appeal No. 4 the unsuccessful respondent Ramdas will have his costs of issues 1 to 5 and 8 against the appellants. In each case the person, in whose hands the sale-proceeds are, must hand over the net sale-proceeds, deducting any charges justly due, to the successful appellants.

In Appeal No. 4 of 1912—

Attorneys for the appellant: *Messrs. Jamsetji, Rustomji and Devidas.*

Attorneys for the respondent: *Messrs. Edgelow, Gulabchand, Wadia & Co.*

In Appeal No. 7 of 1912—

Attorneys for the appellants: *Messrs. Matubhai, Jamietram and Madan.*

Attorneys for the respondent: *Messrs. Edgelow, Gulabchand, Wadia & Co.*

Decrees reversed.

H. S. C.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

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B. A. BRENDON, COLLECTOR OF BELGAUM, AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* SHRIMANT SUNDARABAI, HUSBAND'S NAME LINGAPPA JAYAPPA SAR DESAI, AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Regulation XVI of 1827—Bombay Act XI of 1843, section 2—Summary Settlement Act (Bom. Act II of 1863), section 12—Hereditary Offices Act

* First Appeal No. 80 of 1912.

(Bom. Act III of 1874)—Civil Procedure Code (Act V of 1908), sections 11 and 15—Service inam land—Summary settlement—Alienation—Will—Probate—Decision of Probate Court not to be destroyed by adjudication in a regular suit—Res judicata

The title of the family of Navalgund Desai came into existence in the time of the Bijapur Monarchs in the 17th century The Desai was the chief revenue officer of the district under both the Mahomedan rule and the Maratha rule which followed it

The services of the Desai as revenue officer were not made use of during the British rule and he was informed in 1848 by the Collector under the provisions of section 2 of Bom Act XI of 1843 that his services as a revenue officer would not be required of him As the result of inquiry regarding claims to inam lands, the Desai for the time being was offered the option of commuting his service by payment of an annual sum in the nature of a quit rent for the lands which he held up to that time on a service tenure, or by occasional payments in the nature of fines both which classes of payments were styled "Nazarana"

In the year 1862 the Government passed a Resolution No 455 sanctioning the treatment of the Navalgund Desai's *potgee* (allowance) as a personal holding continuable to the holder on the terms of the summary settlement and the Desai consequently accepted the settlement on the terms that the commutation payment should be in the nature of an annual 'Nazarana' or quit-rent

Lingappa Sir Desai, the last male member of the Desai family, made a will prohibiting his widow from making an adoption and bequeathing the whole of his property to charity The will was propounded for probate in the District Court of Belgaum and was duly admitted to probate and the grant of the probate was confirmed by the High Court in appeal

The widow of Lingappa made an adoption and she and the adopted son brought the present suit for a declaration that the testator had no power to make a will and to alienate the property which being service inam was inalienable.

Held, that the settlement of the Navalgund Desai of the year 1862 was a settlement valid and binding upon Government that under the settlement the Desai was no longer liable to render any service in respect of the lands held by him and they were, therefore no longer held upon service tenure and that the possession of lands as service lands for 200 years in the absence of any evidence as to family custom could not impress them with the character of inalienability

Held, further, that where service has been commuted for a quit rent if the donee's descendants should continue to pay the rent, the tenure would be

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altered from service to rent, that in the case of service land, which in practice at all events was not usually alienated, it would be difficult to establish a family custom which should have any effect, as distinct from the ordinary incidents of a service tenure, and evidence that land had remained in a family for a long period of years and had descended by the rule of primogeniture where it was service land, would be more consistent with the fact of its having been held for service than with the theory of any special family custom and that when service had come to an end the last holder, if he had no sons or co-sharers, could put an end to a tenure based upon family custom, and that the lands might be treated as the property of an ordinary Hindu land owner subject to the payment of the agreed quit rent to Government and in the absence of co-parceners the owner could dispose of the lands by will

Held further, that under section 11 of the Code of Civil Procedure it was not open to the Court, after the decision of the District Court granting probate of the will, to try the question of the authority of the widow to adopt, which question was bound up with the question of the revocation of the will in the present suit, inasmuch as the issue decided by the Probate Court had conclusively determined between the parties the question of whether or not the testator had revoked his will before death and whether the statement that he had given authority to his widow to adopt expressed his wishes at the time of his death, and inasmuch as the District Court which had tried the probate case was a Court competent to have tried the present case

FIRST appeal against the decision of V. V. Phadke, First Class Subordinate Judge of Belgaum, in original suit No. 50 of 1909.

Suit for declarations and injunction.

The facts were as follows :—

The Sar Desai family of Navalgund was at one time one of the most important Desai families in the Belgaum District and enjoyed enormous income derived from inam villages. The representative member of the family for the time being was the chief revenue officer of the Province. The title of the family came into existence in the time of the Bijapur Monarchs in the 17th century and it was recognized by the Maratha rule which followed the Mahomedan rule. The grants of inam villages had been made to the Desai for the time being. The grants were sometimes made to the

Desai simply and sometimes they were expressed to be for the Desai and his karkuns. The family continued to enjoy the inams till they were confiscated by Tippu Sultan at the time of his conquest of the Southern Maratha Country. After the reconquest of the country by the Peshwa Government, the inam in its entirety was not restored to the family, but the grant was confined only to ten villages for the maintenance of the Desai and his karkuns. The grant was shown in the revenue records under the heading "service vatan". After the introduction of the British rule the grant was continued to the Desai on the *original terms for* allowance under an order, dated the 11th January 1818. Later on orders were issued by Government that all holders of service vatans must perform service The Sar Desai of Navalgund was accordingly called upon to render service and he having refused to do so some of his lands were ordered to be attached. He appealed to the Collector and Political Agent of Dharwar who decided on the 21st December 1836 that the said order did not apply to *sansthans* (chiefs) like the Sar Desai and the attachment was removed. In 1840 the inam was again attached because the widows of Lingappa, who was then the Sar Desai, made an adoption which had not been authorized. Subsequently the adoption was sanctioned by Government and the attachment was removed in or about 1847

In the Government records the inam being entered as "land held for service", the Collector informed in the year 1818 the then Sar Desai that his services as a revenue official would not be required of him At that time and for many years afterwards the Government was occupied in investigating the claims to inam lands held whether for service or as reward for past services and in the course of the proceedings the Sar Desai for the time being was offered the option of commuting his

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service by payment of an annual sum in the nature of a quit-rent for the lands which he held up to that time on service tenure or by occasional payments in the nature of fines both which classes of payments were called "Nazarana".

Then came the Government Resolution No. 455 of 1862, dated the 6th February 1862, sanctioning the proposal of the Revenue Commissioner to treat Navalgund Desai's *potgee* (allowance) as a personal holding continuable to the holder on the terms of the summary settlement. The settlement thus sanctioned was accepted by the Sar Desai the same year.

Lingappa, the last representative of the Sar Desai family, made a will on the 26th June 1906 and a codicil, dated the 13th August 1906, whereby he prohibited his wife Sundarabai from making an adoption and bequeathed his property to charity, namely, Lingayat Fund, an institution founded with a view to encourage and assist Lingayat students. Lingappa died on the 23rd August 1906. Sundarabai, notwithstanding the prohibition in her husband's will, adopted Jayappa on the 10th December 1906.

On the 22nd February 1909 Sundarabai and Jayappa, as plaintiffs 1 and 2, respectively, brought the present suit for a declaration that the will and codicil of Lingappa were illegal and he had no authority to execute them and that the defendants, who were the executors under the will, acquired no rights under it. The plaintiffs further prayed for a declaration that plaintiff 2 was the lawfully adopted son of the deceased Lingappa and for an injunction calling upon the defendants not to obtain possession of the property from the Court of Wards which had, under the order of the District Court, taken charge of it owing to the minority of plaintiff 1. The plaint alleged that in accordance

with the direction given by the deceased, plaintiff 1 duly adopted plaintiff 2, that the will and the codicil were owing to various reasons illegal because at their dates the deceased was very ill and was not in a fit state of mind to execute them, that at the time of the codicil some selfish persons had obtained complete influence over the mind of the deceased and he was no longer master of his own will and did not know what he was doing, that, therefore, the deceased in the presence of many persons revoked the will and gave permission to plaintiff 1 to adopt a boy and to continue the *sansthan* as formerly, that the property was granted by the Peshwa for the maintenance of the Desai and his family and the karkuns of the family, that according to the orders of Government and the will of the adoptive father of the deceased and the agreements entered into by the deceased with his adoptive mother, he had no right to alienate the property and that as the karkuns as well as the members of the Desai family were interested in the property, Venkaji Krishna Kulkarni was joined as plaintiff 3, he being an old karkun of the family having interest in the property. The plaintiffs did not claim possession of the property from the defendants as it was already in the possession of the Court of Wards.

The defendants answered that the deceased Lingappa was full owner of the property in suit and had full testamentary power to dispose of it, that nothing in the original grant, or in the terms of his own adoption, or in the will of his adoptive father did or could restrict deceased Lingappa's power of disposition, that at the time of making the will and the codicil the deceased was in full possession of his mental faculties and was under no external influence, that he did not authorize plaintiff 1 to adopt a son, that the allegation that the deceased cancelled his testamentary disposition was

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untrue, that plaintiff 2 was brother of plaintiff 1 and the adoption of the former was invalid in law, it being prohibited by the will of the husband of the latter and that plaintiff 3 had no right to join in the suit.

The executors appointed under the will applied in the meanwhile for the grant of a probate and the District Court at Belgaum having made the grant, it was confirmed by the High Court in appeal.

The Subordinate Judge found that the will and codicil relied on by the defendants were proved to have been executed by the deceased Lingappa, that the deceased was then in such mental condition as to understand the nature and effect of the disposition that he was making, that the deceased had no power to dispose of the property in the way he did, that the deceased had not revoked the disposition, that plaintiff 1 had adopted plaintiff 2 and the adoption was valid and that plaintiff 3 had a right to bring the suit. The Subordinate Judge, therefore, granted the declarations and injunction prayed for in the plaint.

With respect to the settlement effected by Government in the year 1862 the Subordinate Judge was of opinion that the settlement "was defective inasmuch as the Resolution of 1862 was passed in the absence of information that the Desai had been rendering service during the British rule. Consequently the property remained and still remains *property held for service*."

The defendants appealed.

Jayakar and *Rudrappa*, with *G. S. Mulgavkar*, for the appellants (defendants):—The main question involved in the case is whether the property in suit was alienable in the hands of Lingappa and could pass by his will. We submit that it was so alienable having regard to the terms of the grants under which it was held and the decision of the Bombay Government under

Bombay Acts XI of 1852 and II of 1863. (Counsel traced the history of the property from the days of Bijapur Princes, Tippu Sultan and the Peshwas ending with several orders of the British Government passed from time to time regarding the nature of the vatan.) We contend that there is hardly anything in these grants and orders making the property inalienable. But assuming it was so, we further say that the Government Resolution No. 455, dated the 6th February 1862, taken along with the correspondence and the other material on the basis of which the British Government passed the said Resolution is an adjudication as to the alienability of the property under Act XI of 1852, Exhibits 236, 154 and 151. Notices of the said Resolution were given to the Desai and Nazarana on the footing thereof was demanded and levied, Exhibits 243, 246 and 248. See also sections 4 and 5 of the said Act. Thereupon the Government went on issuing fresh sanads to the Desai alone of the lands in suit the terms of which make the property heritable and alienable on the satisfaction of the terms and conditions mentioned in the said sanads, Exhibits 108, 99 and 126. Therefore it is no longer open to a Civil Court to determine the nature of the property by going behind the sanads and the settlement by the Government under the said Acts. Government alone were competent to determine its nature under section 16 (*d*) of the Summary Settlement Act, which applies to provinces governed by Act II of 1862 and therefore to this property. See section 1, clauses 1 and 2, sections 2, 3, 4, 12, 16 (*d*), (*e*), (*g*) of the Summary Settlement Act. The lower Court was wrong in observing that Government had not sufficient material before them. See Exhibit 164 and compare also section 16 (*d*) of the Summary Settlement Act and section 114 of the Evidence Act under which a presumption will arise in our favour that Government made all

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regular inquiry: *Jamal Saheb* v. *Murgaya Swami*[1]. Government must be presumed to have all proper material before them and in fact they had it before them, Exhibits 77, 154, 80, 82, 88 and 200, which give a clear idea of the circumstances relating to the nature of the vatan. Sanads, Exhibits 108, 99 and 126, also confirm the same view. Courts cannot go behind such an inquiry: *Jamal Saheb* v. *Murgaya Swami*[1]. Section 4 of the Revenue Jurisdiction Act (Bom. Act X of 1876) is also a bar to such an inquiry on the part of Civil Courts.

The word "determine" used in the sections of the Summary Settlement Act, *e.g.*, section 16 (*d*) points to a conclusive determination. In the Land Revenue Code the said word has been so construed: *Bai Ujam* v. *Valiji Rasulbhai*[2], *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande*[3].

Even assuming that the property could be regarded as a service vatan *ab initio* the power of Government to give up the required service is complete under the various Acts relating to vatans. Moreover, the condition of service as a consideration for the enjoyment of the vatan was imposed by Government for their own benefit and they are entitled to give up the benefit if they choose. No one else is entitled to question the act of Government, not certainly the heirs of Lingappa who had himself acted on and benefited by the relinquishment of service.

Assuming that Courts could go into the said question and inquire into the nature of the vatan, we say that in 1906 when Lingappa's will became operative, the lands were not in fact service vatan. The Mahomedan sanads do not show that the rendition of future service

(1) (1885) 10 Bom. 34 at p. 40. (2) (1886) 10 Bom. 456 at p. 460.
(3) (1885) 9 Bom. 198 at p. 214.

was made a condition. Very few of the said sanads speak of any service at all. A few of them speak only of past and present service and when present service is mentioned, it is simply the implied service of paying homage by being present in Court, Exhibits 176, 183 and 213. Therefore the case would come under the words "nominally for the performance of service" contained in section 16 of the Summary Settlement Act.

The Maratha sanads are also similar. Only two of them mention past service. When no service is mentioned in connection with the lands, such lands are private property. The British Government continued the lands on the same tenure as before, Exhibits 201, 202. Even if service was once attached as a condition, the same has been given up by Government, the only party interested in the question, Exhibit 154, and on that footing the Government had formerly released the lands from attachment, Exhibit 200. In this view of the case we rely upon the ruling of the Full Bench in *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande*[1]. Further there was a regrant of the property to Lingappa's father on certain conditions which had been fulfilled by the grantee, Exhibits 80, 82 and 85.

The settlement has been in operation for over half a century. The Desai himself could not have gone behind the settlement, much less can his heirs.

As to the position of the karkuns represented by plaintiff 3, we submit that they have no interest in the lands in suit and they cannot join in the present claim. The allegations in the plaint in this behalf are not clear and we resist the karkun's claim on grounds such as follow:—

(1) The original grants mentioned the karkuns but no distinct interest was given to them as donees.

[1] (1885) 9 Bom. 198.

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Reference was made to the purpose of the grant, namely, a provision for the establishment of karkuns. Therefore the principle of section 125 of the Indian Succession Act would apply. The class of karkuns besides is too indefinite to be made direct donees. No sanads were issued to the karkuns and no ancestors were mentioned by name. We, therefore, say that no interest was given to them as donees under the grants. (2) Whatever interest they might have had in the property, the same was carved out by the Desai who had given by a *pot* grant separate lands, which have been kept and enjoyed by them for several years and are not included in the suit, Exhibits 67, 77, 79, 80 and 91. (3) Owing to the said circumstance the British Government, in making fresh grants with reference to the lands in suit, treated the estate as split up and made no mention of the karkuns at all in the grants made to the Desai. The karkuns had separate sanads issued to them by the Government with reference to the lands carved out and enjoyed by them. These lands are not included in the suit and that being so, why should the karkuns claim any share in our lands? (4) Whatever rights the karkuns may have had in the lands in suit, the same have become time-barred. The Desai enjoyed the lands in suit for 400 years and the karkuns have not enjoyed any benefit out of these lands for 12 years before suit. This is admitted by plaintiff 3 in his deposition, Exhibit 67. (5) Whatever rights the karkuns may have as true owners, those rights are even now saved by section 3 of the Summary Settlement Act and the decision in the present suit will not bar any rights they may have. They can sue those who hold the lands under Lingappa's will.

As regards the question of the validity or otherwise of the adoption of plaintiff 2, we say that Lingappa's

will, Exhibit 93, prohibits the adoption. The plaintiffs allege that the will was revoked and a fresh authority was given to the widow to adopt. The same story of revocation was urged in the previous probate proceedings and was rejected by the High Court. The question is, therefore, *res judicata*. The judgment on this point was given by the lower Court before the date of the High Court's decision.

Lastly we submit that in any event the property of the Desai, which is admittedly not of the nature of service vatan, is not open to the objection raised in the plaint and must pass to the defendants under Lingappa's will.

Weldon, with *N. A. Shiveshvarkar*, for the respondents (plaintiffs) :—The lands were held for service and the fact that the service ceased to be demanded could not make them private property. See the definition of "hereditary office" in the Vatan Act : *Ramrao Trimbak* v. *Yeshvantrao Madhavrao*[1], *Savitriava* v. *Anandrav*[2], *Bai Jadav* v. *Narsilal*[3]. The lands could not be dealt with under the Summary Settlement Act because service lands were expressly excluded from the operation of the Act by section 1, clause 2, exception No. 3.

No doubt the Government had power to determine whether the lands were held for service or not. But the power was given to Government by the Act which had not been passed at the date of the Government Resolution of 1862. Therefore any settlement based upon the Government Resolution was *ultra vires* in its inception and could not affect the character of the property : *Jamal Saheb* v. *Murgaya Swami*[4].

(1) (1885) 10 Bom. 327.
(2) (1875) 12 Bom. H. C. R. 224.
(3) (1900) 25 Bom. 470.
(4) (1885) 10 Bom. 34 at p. 40.

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Section 12 of the Summary Settlement Act, no doubt, validates the prior settlement, but that section does not validate the "determination" by Government. Moreover the section says that the settlement made for the purpose of carrying out the object of the Act shall be valid. The object of the Act as set out in the preamble is to provide for the final adjustment summarily of unsettled claims to exemption from the payment of land revenue, etc. From this it is clear that the object was to secure the adjustment of claims to exemption from the payment of land revenue to Government and nothing more. To this extent the settlement was valid. But it could not make the property private.

Moreover there has been no determination whatever. The Revenue Commissioner merely asked for sanction to the treatment of the Desai's *potgee* as a personal holding and the Government granted the sanction. This cannot be called a determination which connotes some inquiry and decision or exercise of judgment by Government.

The property was inalienable in 1862 under section 20 of Regulation XVI of 1827. The privilege of declaring the interpretation of law was vested in the Governor in Council for two years and then in the Sadar Diwani Adawlat, see clauses 2 and 3 of section 7 of Bombay Regulation I of 1827. Under the interpretations it was held that lands attached to hereditary offices are entailed estates: *Bhimappa* v. *Mariappa*[1], *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande*[2].

We further say that even if the Summary Settlement Act had been passed before the settlement, still the property would not be alienable private property, *vide*

[1] (1866) 3 Bom. H. C. R. A. C. J. 128 at p. 130.
[2] (1885) 9 Bom. 198 at p. 209.

Government Resolution No. 4425, dated the 16th December 1867, which was followed in other Resolutions, No. 6502, dated the 16th October 1900, No. 482, dated the 26th January 1901, and No. 6183, dated the 2nd November 1875.

With respect to adoption. The probate proceedings do not form part of the record of the case. They were not put in evidence in the lower Court, nor is there any application here that they should be admitted. Moreover there was no express prohibition to the adoption. Having regard to the fact that part of the property is inalienable, the adoption is good in law. *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*[1].

SCOTT, C. J.:—The plaintiff sued for a declaration that the will and codicil of the deceased Desai of Navalgund was inoperative and the defendants as executors had no rights under it, and that the plaintiff 2 was the lawfully adopted son of the deceased, and they prayed for an injunction restraining the defendants from entering into possession of the plaint property. The Desai of Navalgund was the last of a series of Desais whose title came into existence in the time of the Bijapur Monarchs in the 17th century. The Desai was the chief revenue officer of the district under both the Mahomedan rule and the Maratha rule which followed it. During the tenure of office of the family, to which the deceased Lingappa belonged, many grants in inam of villages had been made to the Desai for the time being. Sometimes they were expressed to be for the Desai and his karkuns and sometimes they were grants given to the Desai simply. After the disturbance and the unsettlement caused by the irruption of Tippu Sultan into the Southern Maratha Country, the grants

(1) (1868) 12 Moo. I. A. 397 at pp. 443, 445.

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to the Desai family were eventually confined to ten villages.

The services of the Desai as a revenue officer were not made use of during the British rule and he was informed in 1848 by the Collector under the provisions of section 2 of Bombay Act XI of 1843 that his services as a revenue official would not be required of him. At that time and for many years afterwards the officials of the British Government in the Southern Maratha Country were occupied in investigating and passing decisions and coming to settlements regarding claims to inam lands held, whether for service or as reward for past services, and in the course of the proceedings the Desai for the time being was offered the option of commuting his service by payment of an annual sum in the nature of a quit-rent for the lands which he held up to that time on service tenure, or by occasional payments in the nature of fines, both which classes of payments were styled "Nazarana".

Under the Government Resolution No. 455 of the 6th of February 1862, the request of the Revenue Commissioner for sanction to the treatment of the Navalgund Desai's *potgee* as a personal holding continuable to the holder on the terms of the summary settlement was sanctioned, and in consequence of that sanction the offer of the settlement was made to the Desai, and that offer was accepted on the terms that the commutation payment should be in the nature of an annual Nazarana or quit-rent. That was in the year 1862. At that time there was no express legislative provision sanctioning such settlements, although it may well be argued that the commutation of a service, which was no longer wanted, by an agreement to pay a fixed yearly sum, was within the competence of the executive authority in the Bombay Presidency. But any doubt as to the validity of the settlement is put an end to by reference to section

12 of Bombay Act II of 1863, which applies to the districts in which the Navalgund Desai's inam villages lay. It is in the following terms :—

All notices and orders issued, and all settlements made, in the districts subject to the operation of Act XI of 1852, previous to the passing of this Act for the purpose of carrying out its objects, shall be as valid and as binding on Government, and on the holders and owners of, and all persons interested in, lands affected by such notices, orders, and settlements as if this Act had been passed before the said notices and orders were issued, and the said settlements made, which shall accordingly be regarded and taken to have been made under this Act, all the provisions of which, as to the future rights, privileges, and duties of the holders and owners of land to be brought under settlement by it, shall apply to the holders and owners of land already brought under settlement as aforesaid.

It has not been contended that the Bombay Legislature had not authority *to enact that section validating the* settlements so made, and the settlement made of the Navalgund Desai must, therefore, be takan to be a settlement valid and binding upon the Government.

What then was the position of the Navalgund Desai after this settlement? He was no longer liable to render any service in respect of the lands held by him, and they were, therefore, no longer held upon a service tenure. The terms upon which they were held were that a fixed annual quit-rent should be paid for them. It is contended for the plaintiffs that the lands, as *service lands in the possession of the Desais for the last* 200 years, were impressed with the character of inalienability. It has been suggested, but faintly, that the inalienability arose by reason of family custom, but no evidence of any importance has been adduced in support of that contention.

The more serious argument is that lands assigned as emoluments of district revenue officers were inalienable by custom and by express legislative provision. The first legislative provision on the subject, to which we have

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been referred, is Regulation XVI of 1827. As regards the argument based on custom we must consider whether the character of inalienability was attached to these lands by law or custom at the time of the passing of that Regulation. The question was discussed by Sir Michael Westropp in *Krishnarav Ganesh* v. *Rangrav*[1]. He says :—"As to civil hereditary offices, and the inams (watan) annexed to them, the balance of authority seems to incline in favour of the alienability in permanence (*previously to British legislation*) as well of the offices as of the inams appendant to them, together or separately. . . . . . In the case of some, but not of all, such offices, the assent of the Native Government seems to have been necessary to the validity of the alienation, and also, if the watan were undivided, the assent of the co-parceners, if any." With reference to those last remarks, it is to be observed that after the settlement, which derives its conclusive validity from the legislative provisions of Act II of 1863, there can be no doubt as to the assent of the Government for the time being to the alienability of the inams, and as far as concerns the testator in the present case, there is no question of any co-parceners, unless it be held that the 2nd plaintiff is an adopted son, and in that position entitled to the rights of a co-parcener. Authority, therefore, is in favour of the conclusion that up to the legislation of 1827 these inams were not inalienable.

The Regulation XVI of 1827, section 20, prohibited alienation, by any hereditary officer, of his official emoluments, and directed that such official emoluments enjoyed by a co-sharer should not leave the family in which the office was vested. The Regulation of 1827 was superseded by the Vatan Act of 1874. But that Act came into force long after the settlement of the inam

[1] (1867) 4 Bom. H. C. R. (A. C. J.) 1 at pp. 11 and 12.

lands in 1862, and settlements which have been effected under, and are within the purview of Act II of 1863, prevent the inam lands, to which they relate, from being subject to the provisions of the Vatan Act, because the holder under the settlement is no longer a hereditary officer holding for service.

Is there then any reason why the inams held by the Desai should, subsequent to the settlement, be regarded as impressed by any inalienable character such as does not appertain to the property of an ordinary Hindu land owner? It appears to us that there is not, and that conclusion is supported by the judgment of the Privy Council in *Rajah Mahendra Singh* v. *Jokha Singh*[1], with reference to what was known as "Mafeebirt tenure". Service was commuted for a quit-rent, and it was held by the Judicial Committee, if the donee's descendants continue to pay the rent, the tenure is altered from service to rent. In the case of service land, which in practice at all events is not usually alienated, it is difficult to establish a family custom, which should have any effect, as distinct from the ordinary incidents of a service tenure, and evidence that land has remained in a family for a long period of years, and descended by the rule of primogeniture where it is service land, is more consistent with the fact of its being held for service than with the theory of any special family custom. Moreover when the service has come to an end the last holder, if he have no sons or co-sharers, can put an end to a tenure based upon family custom: see *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar*[2]. If then the inams of the Desai may be treated as the property of an ordinary Hindu land owner, subject to the payment of the agreed quit-rent to Government, there is no reason

(1) (1873) 19 W R. 211. (2) (1872) 1 Cal 186 at p 195.

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why he, in the absence of co-parceners, should not dispose of that property by will. He has made some provision for his wife, the 1st plaintiff, providing her with Rs. 100 a month, and a certain retinue, and if he did make a will, *as is alleged, it is difficult to see how a subsequently* adopted son can defeat the provisions of that will.

The will was propounded for probate in the District Court of Belgaum, a Court competent to try the questions arising in this suit. That Court decided that the will and codicil, under which the defendants claim, was a testamentary document executed by the testator, and as a consequence the provisions of the testator speak from the time of his death. These testamentary provisions include a provision for charity, based upon the recognition of the fact that he has no natural born son, and upon the assertion that he has not given and will not give the widow authority to adopt any son after his death. The contention, however, on behalf of the second plaintiff is that he is a validly adopted son of the testator. In order to prove that, eleven witnesses are produced who speak to words uttered by the testator within twenty-four hours of his death in which he stated that he had revoked his will and given his widow authority to adopt a son. These allegations were put forward in the Probate Court by the same parties, the 1st and 2nd plaintiffs, in their contention with the executors, who are the present defendants, who were then propounding the will and the codicil. Thirteen other witnesses were upon that occasion produced to prove the statements of the testator as to revocation of the will and authority to adopt and those thirteen witnesses were disbelieved by the Probate Court. The decision of the Court upon that point was affirmed by the High Court in appeal. The allegation of the plaintiffs involves the destruction of the conclusion arrived by the Probate Court negativing the alleged

revocation and affirming the testamentary character of the will which contains the statement with reference to authority to adopt. It appears to us that the learned Judge of the lower Court was in error in thinking that it was open to him, after the decision of the District Court in the will case, to try the question of the authority which was bound up with the question of revocation in the present suit. The issue which was decided by the Probate Court was that the words of clause 9, as part of the will, formed part of the testamentary document speaking from the death of the testator, and that conclusively determined between the parties the question whether or not the testator had revoked his will twenty-four hours before his death, and whether or not the statement, as to his having given any authority to his widow to adopt, expressed his wishes at the time of his death. Therefore, under section 11 of the Civil Procedure Code the Subordinate Judge should not have tried the issue, because the District Court which tried the probate case was competent to try the present suit, although in order to relieve the superior Court of part of its work section 15 of the Code provides that every suit shall be instituted in the Court of the lowest grade competent to try it, and, therefore, this suit was instituted in the Court of the First Class Subordinate Judge see *Nidhi Lal* v. *Mazhar Husain*[1] and *Matra Mondal* v *Hari Mohun Mullick*[2].

We now come to the case of the 3rd plaintiff. He can only be joined in this suit with the other plaintiffs if he makes common cause with them, and claims that he is entitled jointly, severally or in the alternative, upon proof of the allegations contained in the plaint. His case is, he being a man of forty years of age, born subsequent to the settlement of 1862, that from his own

(1) (1884) 7 All 230 (2) (1889) 17 Cal 155

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knowledge he can say that his father and grand-father and great-grand-father were karkuns under the Desai of Navalgund, and that therefore, they were entitled as beneficiaries, as persons answering a particular description in the sanads, to share in the revenues of the inam villages with the Desai. In so far as there is any contest between the 3rd plaintiff and the 1st and the 2nd plaintiffs as to their respective rights to the revenues of the inam villages, the third plaintiff is not competent to join with them in this suit, but we do not think that any question of misjoinder really arises, because upon the evidence in the case the only inam, in which it is clearly shown that the karkuns, whom the 3rd plaintiff claims to represent, were interested, was an inam of land amounting to twenty acres in Kalapur which is not in question in this suit (see Exhibit 77, cl. 11, 1, and Exhibit 91). The 3rd plaintiff, therefore, in relation to lands in suit stands in no better position than the 1st and the 2nd plaintiff. In respect of the lands in suit, other than the patilki and kulkarniki vatans, in which the 1st plaintiff, as the widow of the testator, would be interested as vatandar, and which under section 5 of the Vatan Act of 1874 would not be alienable by the will, the suit must fail. If it is agreed which lands mentioned in the plaint are held upon service tenure as patilki or kulkarniki vatans, they can be excluded from the decree dismissing the suit, and the plaintiff will be entitled to a declaration regarding them. If an agreement cannot be arrived at, there must be a remand to the lower Court to ascertain what those lands are. We think that in this case the costs of both parties in both the Courts should come out of the estate

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr Justice Batchelor.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT 1), APPELLANT, *v.* MAJOR J. E. HUGHES, SECRETARY OF THE WESTERN INDIA TURF CLUB (ORIGINAL PLAINTIFF) RESPONDENT.*

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authorities at Poona which the plaintiff paid under protest on the ground that the assessment was illegal. The plaint alleged *inter alia* as follows :—

The Western India Turf Club was the lessee from Government of the Race Course at Poona and was liable to be assessed for the property rates in respect of the said premises in accordance with the provisions of clause 1 of the Poona Cantonment Taxation Regulations, 1881[1].

By Government Notification No. 481 of the 7th September 1891, a general property rate of four per cent. per annum of the annual value of houses, buildings and lands liable to property rates was imposed on the Cantonment of Poona where the said Race Course is situate.

The Western India Turf Club was assessed for the year 1904 for the purpose of property rates at Rs. 201-8-4 and such assessment was continued down and inclusive of the year 1908.

On the 8th October 1908 the Cantonment Magistrate of Poona served on the plaintiff a notice stating that he had revised the valuation of the said Club's property at Poona and assessed the rate at Rs. 9,840 per annum based on an annual income from certain sources of Rs. 2,46,000. On the 10th October 1908 the plaintiff sent a reply to the Cantonment Magistrate protesting against the enhanced assessment.

The Cantonment Magistrate based the valuation of the property of the said Club on the sum of Rs. 2,46,000 which represented the gross income of the said Club from certain souces and treated that sum as the annual

[1] Clause 1 of the Poona Cantonment Taxation Regulations, 1881, provided that the estimated gross annual rent at which houses, buildings and lands liable to property rates may reasonably be expected to let from year to year shall for the purposes of the said rates be held and deemed to be the annual value of such houses buildings and lands.

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rent that a tenant from year to year would pay, and in doing so he did not follow the provisions of the said Taxation Regulations made in case of the assessment being increased.

The said Club appealed to the Cantonment Committee who rejected the appeal and declined to give any reasons for the rejection. The Club subsequently petitioned the Governor of Bombay in Council but were informed that the Governor had no power to interfere. The Governor in Council, however, thereafter passed a Regulation which in future permitted an appeal to Government against the decision of the Cantonment Committee.

The said Club paid under protest the sum of Rs. 1,819-3-10 in respect of the said taxation imposed as aforesaid for the latter half of the year 1908-09 in addition to a sum of Rs. 100-12-2 which they had already paid in respect of the assessment for the latter half of the year 1908-09.

The Cantonment Magistrate altered the assessment from Rs. 9,840 to 9,544-2-6 as he found that on his own basis of assessment the former figure was too much. He returned to the said Club the sum of Rs. 1,819 paid to him under protest and the Club in return paid to him under protest a sum of Rs. 4,671-6-1 in respect of the said tax as aforesaid for the latter half of the year 1908-09.

The Club was assessed at the rate of Rs. 9,544-2-6 for the years 1909-10, 1910-11, 1911-12 and they paid in all under protest amounts making the aggregate sum of Rs. 33,303-13-7. The Club was thus entitled to recover from the defendants or any one of them the said amount less the annual assessment of Rs. 201-8-4 yearly payable by the Club and interest thereon at 9 per cent. from the respective dates of payments.

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The entries in the Assessment Books for the said years were nullities and should be ignored altogether, and, if necessary, they should be erased and expunged.

The first defendant was made a party to the suit as the Cantonment Fund which was liable to pay to the Club the moneys claimed in the suit was vested in him.

The Club had brought against the Cantonment Committee a suit, No 5 of 1909, in the District Court at Poona to recover the amounts respectively paid under protest for the latter half of the year 1908-09 and the first half of the year 1909-10 The said suit came up in appeal, No. 9 of 1910, to the High Court, which, on the 28th June 1910, dismissed the said suit on the ground that the defendants were public officers and had no notice of the suit. Therefore, the time occupied by the said suit from the 10th August 1909 to the 28th June 1910 should be deducted in computing the period of limitation.

Notices of the present claim were duly served on the defendants as required by section 80 of the Civil Procedure Code and the plaintiff craved leave to sue under Order I, Rule 8, Schedule I of the Civil Procedure Code.

The cause of action arose at Poona and the District Court had jurisdiction to try the suit.

On the said allegations the plaintiff prayed that (1) it may be declared that the Western India Turf Club was improperly assessed as aforesaid in the years 1908-09, 1909-10, 1910-11, 1911-12, (2) the assessment by the Cantonment Magistrate for the years aforesaid may be declared illegal, void and contrary to the Poona Cantonment Taxation Regulations, (3) the said assessments may be declared to be nullities and, if necessary, may be erased and expunged from the Assessment Books, (4) the defendants or some or one of them may be ordered

to repay to the plaintiff as representing the members of the Western India Turf Club all payments levied on and paid by the said Club for the latter half of the year 1908-09 and the years 1909-10, 1910-11 and 1911-12 in excess of the annual assessment of Rs. 201-8-4 yearly payable by the said Club, (5) it may be declared that until the assessment of Rs 201-8-4 made in 1904 and continued down to 1908 had been revised and altered in accordance with the provisions of the Poona Cantonment Taxation Regulations, that assessment was the only valid and binding assessment of the Poona Race Course, (6) all necessary directions may be given, enquiries made and accounts taken, and (7) the defendants, any one or more of them may be ordered to pay to the plaintiff all the costs of and incidental to the suit.

The suit was filed on the 28th March 1912.

Defendant 1, the Secretary of State for India in Council, answered as follows :—

The plaintiffs were not entitled to the reliefs claimed or any of them.

The Civil Court had no jurisdiction to entertain the suit by virtue of the provisions of section 15 of the Poona Cantonment Taxation Regulations.

The claim was time-barred under Article 14, Schedule I of the Limitation Act. It was in any case partially time-barred under Article 62 of the same Schedule as regards the payment of assessment for the latter half of the year 1908-09.

The allegations of facts contained in the plaint were not denied.

The Cantonment Magistrate's valuation was not based on an erroneous principle, nor was it contrary to the Taxation Regulations or otherwise illegal or improper. The said entry of Rs. 9,840 was made after due inquiry and it was in every respect a valid entry.

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The assessment up to the half year ending with the 30th September 1908 was calculated on a wrong basis. It was revised on the basis of the actual gross annual rental realized by the Club in accordance with section 1 of the Taxation Regulations and due notice of such assessment was served on the plaintiff on the 8th October 1908.

The enhanced assessment of Rs. 9,840 was calculated on a valuation of Rs. 2,46,000; subsequently on the Club submitting its accounts it was altered to Rs. 4,772-1-3 for the half year calculating it at four per cent. on the gross annual rent of the Race Course which for the half year ending 31st March 1909 was found to have amounted to Rs. 2,38,604.

The statement in the plaint that the Cantonment Magistrate returned to the Club Rs. 4,819-3-10 and the Club in return paid a sum of Rs. 4,671-6-1 was not correct. The fact was that after the revision of the assessment as stated above the Cantonment Magistrate only returned the balance of Rs. 141-14-9 to the Club after deducting Rs. 6 as brokerage for cashing the cheque of Rs. 4,819-3-10 given by the Club on the 30th November 1908.

The alleged payments by the Club were not illegally or wrongfully recovered and the plaintiff had no right to a refund of any portion thereof or to any interest thereon. The plaintiff had no right to have any entry in the Assessment Book erased or expunged.

The suit was time-barred.

The Civil Courts' jurisdiction to entertain the present suit was barred under section 28 of the Cantonment Act, 1910. With respect to the subject-matter of the suit, defendants 2 and 3 had acted in good faith and in pursuance of the powers conferred by or under the said Act and the Cantonment Act, 1889. Defendant 1

was responsible, if at all, only on account of the actions of defendants 2 and 3 as the Regulations previous to the 1st August 1911 did not provide for any appeal or revisional application to Government and no application was made to Government in regard to any assessment subsequent to the 1st August 1911.

Defendants 2 and 3, the Cantonment Committee of Poona and the Cantonment Magistrate of Poona adopted the written statement of defendant 1 and added that they were unnecessarily made parties, that their names should be struck off and that the plaintiff be ordered to pay their costs.

The District Judge found that (1) his Court had jurisdiction to try the suit as against defendant 1 but not as against defendants 2 and 3, (2) the suit was in time, (3) the revised valuation of plaintiff's property by the Cantonment Magistrate was illegal, (4) the plaintiff had paid the amounts of the enhanced assessment under the circumstances mentioned in the plaint, (5) defendants 2 and 3 were not necessary parties and (6) the plaintiff had no cause of action against them. The Judge therefore awarded the plaintiff's claim in full with costs from defendant 1. The plaintiff's claim for interest was not allowed as the suit was not promptly filed.

The District Judge in his judgment observed:—

The plaintiffs deny that the tax has been calculated on the "annual value" of their premises. There is no dispute about any of the facts in this case. The defendants considered the annual value to be the total of a large number of fees received by plaintiffs from various licensees who were allowed to ply their trades on the Race Course. The items are to be found in plaintiffs' printed accounts. They consist mostly of fees paid by bookmakers and keepers of refreshment stalls and by the public for admittance as spectators. Defendant 3 considered that the total of these sums, being rent, should be deemed to be the "annual value" of the premises, and he levied the tax at 4 per cent (the lawful rate) on this sum. Now in the first place these items are not rent but license fees. And, further, defendant 3 was wrong in

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supposing that the total of these fees was a sum at which plaintiffs "might reasonably expect to let" their premises. The total of these sources of income is about 2½ lakhs. Plaintiffs' net profits average about Rs. 30,000 a year. If plaintiffs were to let the Race Course and building for more than about Rs. 30,000 a year, it is obvious *(ceteris paribus)* that their tenant would conduct the business at a loss. Therefore 2½ lakhs is not the "gross annual rent," etc., within the meaning of Regulation 1; and to deem this sum the "annual value" and so calculate the tax was a great error. It was in fact a method of taxation not authorised by the regulations.

The question then arises how the annual value should have been calculated. The following facts are admitted. The lands and buildings form a very fine Race Course. It is the only one in Poona. There is a great demand for a Race Course here. There is no other nearer than Bombay. The real value *of the premises has no relation to the structural value of the buildings or* general utility of the land: it depends on the peculiar suitability of the whole property for the purposes of a Race Course and Turf Club. If plaintiffs were to let to any other body, it would only be to some other Turf Club or similar institution. It is, therefore, clear that this is an "exceptional case", and that the proper method of ascertaining the rateable value is that laid down in *Reg* v. *Verrall* (1 Q. B. D. 9). In brief, the recent average receipts and expenditure of plaintiffs ought to have been considered as an element in ascertaining the rateable value. It was not held that this must be the only element; but, in cases where no means for a comparison exists, obviously this point has great importance. The same view was taken in *Clarke* v. *Fisherton-Augar* (6 Q. B. D. 139) and *The Mersey Docks and Harbour Board* v. *The Assessment Committee of Birkenhead* (1. Q. B. (1900) 143), confirmed by Privy Council (L. R. (1901) 175).

Nothing could be said against these authorities. However, looking to the wording of the regulation itself, it is against common sense to suppose that the Race Course as a whole could be let for about eight times the average net profits.

Defendants do not say it could; and they virtually admit that the orders are quite unjust. But they say that the Law gives defendants 2 and 3 the power to fix the taxes rightly or wrongly and that the Civil Courts have no jurisdiction. The learned counsel for plaintiffs urges that defendants' orders were *ultra vires* and a nullity, defendants having exceeded the powers given by Law. The learned pleaders for defendants say that the orders would only be *ultra vires* if defendant 3 had imposed a tax which he had no authority to impose or having such authority, had imposed it on persons or property exempted by Law. In this case, they say, defendant 3 could legally impose taxes and the plaintiffs are not exempt. So, they argue, the act of defendant 3

in enhancing the tax was not illegal, although he may have acted unfairly, and cannot be said to be *ultra vires* And reference is made to Regulations 1 12 and 15

The Law on the subject up to a certain point is very clear, omitting the question of good faith, for no improper motive whatever is imputed to defendants. So long as a public officer uses the powers he has, he cannot be sued, though he has made mistakes of fact or even of Law It is when he goes beyond his powers that his deeds or omissions become actionable Now in this case did defendant 3 go beyond his powers? The Law allows him to impose a tax; and Regulation 1 says that the tax shall be calculated on the "annual value" of the premises Defendant 3 did not calculate the tax on the annual value, but on some strange and novel method of his own The Law does not justify his action at all It was outside the Law He used powers which the Law had not given him I am, therefore, of opinion that the enhancement of the tax was *ultra vires*

* * * * * *

The learned pleader for defendant 1 argues that when the Law appoints a special Tribunal to decide certain things the jurisdiction of the Courts is ousted I entirely agree with this doctrine, but it clearly pre-supposes that the said Tribunal does not go beyond its powers All the decisions cited by the defence on this point can be distinguished in this way

* * * * * *

It might perhaps be urged that it is easy to refine away the principles, governing these and other cases, until one is forced to conclude that any mistake of Law must result in an act *ultra vires* and so there might be undue interference by the Courts with decisions passed by authorities specially empowered to decide certain things But in my humble opinion, it seems that the Courts have not strained the Law in this direction And the general effect is that a decision not apparently *ultra vires* should be deemed to be so if it is made in an illegal way That is the point in this case Such a decision or act is no better than one which is *prima facie* beyond the powers given by the legislature.

* * * * * *

Defendant 1 appealed.

Strangman (Advocate General) with *S. S. Patkar* (Government Pleader) for the appellant (defendant 1).

Weldon with *Craigie and Co.* for the respondent (plaintiff).

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SCOTT, C. J. :—This suit was instituted by the plaintiffs to recover payment of the amount of taxes levied by the Cantonment authorities at Poona, which the plaintiffs paid under protest on the ground that the assessment was illegal. The learned District Judge by whom the case was heard, disposed of it in favour of the plaintiffs, and this appeal has been preferred by Government on two grounds, first, that the Court had no jurisdiction to entertain the suit; and secondly, that in respect of a portion of the money claimed the suit is barred by the provisions of Article 62 of the Limitation Act.

The argument on the question of jurisdiction amounted to this. According to the assessment rules certain authorities have been constituted for the assessment of taxes, and their assessment is final, except in so far as any question may arise as to the legality of their action having regard to the jurisdiction conferred upon them by the assessment rules, and it was contended that the assessment of the tax complained of by the plaintiffs was a pure question of fact and not of law, and that, therefore, no question arose for the decision of a Court of law, on the analogy, I presume, of applications in revision to the High Court under section 115 of the Code of Civil Procedure. The contention that the assessment of the tax raises a pure question of fact was based upon a passage from the judgment of Lord Halsbury in the *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee*[1] but if that judgment is read as a whole, it does not, as we shall have occasion to show later on, support the appellant's contention.

The rules affecting the taxation for Cantonment purposes of occupiers in Poona were framed by the Government of Bombay under the powers conferred by

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section 22 of the Cantonments Act of 1880, powers which have been continued substantially in the same words through various Cantonment Acts up to the present time. Under those enactments it is provided that the Local Government may, by notification in the Official Gazette, impose in any cantonment, which is not included in the Municipality, any tax which, under any enactment in force at the date of the notification, can be imposed in any Municipality within the territories administered by such Government, and that when any tax is leviable in a cantonment in pursuance of such notification the Local Government may by notification apply or adapt to the cantonment the provisions of any enactment or rules in force at the date of the notification in any Municipality within the territories aforesaid relating to the assessment, collection or recovery of any tax, and refund or revision of, or exemption from any such tax.

In intended execution of the powers conferred by section 22 of the Cantonments Act of 1880, Poona Cantonment Taxation Regulations were notified in the year 1881, which purported to adapt the taxation provisions of the City of Bombay Municipal Act of 1872 and 1878 According to such adaptation the Cantonment Magistrate took the place of the Municipal Commissioner, and the Cantonment Committee took the place of the Court of Petty Session, for the purpose of hearing appeals against rates. The Regulations with which we are concerned in this appeal are Regulations 1, 2, 7 8 10, 13, 15 and 42. Regulation 1 provides that "the estimated gross annual rent at which the houses, buildings and lands liable to property rates might reasonably be expected to let from year to year shall, for the purposes of the said rates, be held and deemed to be the annual value of such houses, buildings and lands" Regulation 2 provides that "the rates shall be leviable from the

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actual occupier if he hold the house, building or land immediately from Government."

By Government notification of the 17th of September 1891, a general property rate of 1 per cent. per annum of the annual value of houses, buildings and lands liable to property rate was imposed on the Cantonment of Poona, and the plaintiffs as occupiers of the Race Course in the Cantonment which they held immediately from Government were liable for the rate.

Until the year 1908, the plaintiffs had been called upon to pay a tax of Rs. 201, assessed upon an estimated gross letting value of the Race Course property of Rs. 5,038. On the 8th of October 1908, they received the following notice from the Cantonment Magistrate:—"Under Poona Cantonment Taxation Regulations the Cantonment Magistrate hereby gives notice to the Secretary, Western India Turf Club, with regard to the property indicated in the margin that he has revised the valuation of the said property and assessed the rates at Rs. 9,840 per annum on an annual income of Rs. 2,46,000, and that any complaints against such valuation must be made to the Cantonment Magistrate in writing and received at this office within three days from the service of this notice." This, therefore, was a case falling under Regulation 10 under which the rates might be increased; that Regulation provides that "notice of the amendment shall be given to the person interested and the date fixed for the hearing of complaints, which shall be made and heard in the manner prescribed in section 8 for complaints concerning original rates in the assessment book." Regulation 8 provides that "all complaints against valuations shall be made to the Cantonment Magistrate by application in writing left at his office three days before the day fixed in the public notice for revising the valuations and rates," the public notice being the notice provided for by Regulation 7 which

must prescribe a day, not being less than fifteen days from the publication of notice, when the Magistrate will proceed to revise the valuations and rates. It is, therefore, apparent that the Cantonment Magistrate in notifying that any complaints against the increased rate must be made within three days from the service of his notice of the 8th of October 1908 was disregarding the express provisions of the Regulations.

It is contended, however, that such disregard of the Regulations is of no importance under Regulation 42, provided the directions in the Regulations have been in substance and effect complied with, and that if that is so, the action of the Cantonment Magistrate cannot be quashed or set aside in any Court. It appears to us that the Regulations have not been in substance or effect complied with. The plaintiffs are called upon within three days to show cause why the rate imposed upon them should not be raised from Rs 201 to Rs 9,840. Such a serious demand was a matter requiring very attentive consideration; and reasonable time was not given to the plaintiffs to take any advice upon the subject. On that ground alone, therefore, we think that the action of the Cantonment Magistrate was not warranted by the Regulations. An appeal was preferred from his assessment to the Cantonment Committee under Regulation 13. The Cantonment Committee only have jurisdiction to hear an appeal against a rate provided it is charged under the provisions of the foregoing Regulations. The appeal to that Committee resulted in a curt resolution as follows:—"Resolved that the appeal of the Turf Club be rejected," and the request for reasons for this resolution was met by a further resolution as follows:— "Resolved that the Solicitors to the Turf Club be informed that the Committee consider that they are not bound to record their reasons for rejecting an appeal." The Turf Club then appealed to the Governor in Council,

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but they were informed that under the Regulations the Governor-in-Council had no power to interfere with the decision of the Cantonment Committee, which according to the provisions of Regulation 15 was to be final. It is not surprising under the circumstances that the plaintiffs paid their tax under protest, and have filed this suit for the recovery of the same as money had and received for their use.

Up to this point we have dealt with the objection to the action of Cantonment authorities on the ground of procedure, and, for the reasons stated, we think that the objection is well founded, that the Cantonment Magistrate did not charge a rate under the provisions of the Regulations, an appeal with reference to which could be heard and determined by the Cantonment Committee.

But there is a more serious objection than that caused by the procedure laid down in the Regulations. It is this: that the Cantonment Magistrate has wholly disregarded the basis upon which the rate is to be assessed. He has assessed a rate upon the gross income of the plaintiffs, which would not even be a basis for the levy of income-tax. Even if the plaintiffs' net profits, which average about Rs. 30,000 a year, had been taken as the basis of valuation, it is clear, for the reasons stated by the District Judge, that no hypothetical tenant could be expected to offer such a sum as rent for the property in question, for as the District Judge points out "if the plaintiffs were to let the Race Course and buildings for more than about Rs 30,000 a year, it is obvious that their tenant would conduct business at a loss," and if they were to let it for that sum only he would make no profit. It would, therefore, not be reasonable to expect that he would offer such a rent. It appears to us that the judgment of Lord Halsbury in the *Mersey Docks and Harbour Board v. Birkenhead Assessment Com-*

mittee[1], already referred to, so far from being any authority in favour of the contention of the appellants is a direct authority for the proposition that where a taxing authority is called upon to assess the tax based upon annual letting value he does very wrong indeed if he rates as if he were dealing with the question for the income-tax. The Cantonment Magistrate has, as stated by the District Judge, "not calculated the tax on the annual value, but on some strange and novel method of his own. The law does not justify his action at all. It was outside the law, and he has assumed powers which the law has not given to him. The enhancement of the tax was, therefore, *ultra vires*, and not a legitimate method of arriving at a fair letting value of the house." It is, therefore, clear upon the authority of *Kasandas* v. *Ankleshvar Municipality*[2], that the case is one in which the jurisdiction of the Civil Courts is not ousted. The money has been claimed and received from the plaintiffs without the shadow of a right, and the plaintiffs having paid under protest are entitled to recover the money, unless their claim is barred by limitation. It is only contended that their claim is barred in respect of the first payment made by them for one half year, being the sum of Rs 1,819-3-10 A cheque for that sum was given to the Cantonment Magistrate by the Turf Club on the 28th November 1908, but it was not cashed by him; and on the 5th of May 1909, he wrote saying that he had made a mistake in the figure which should be Rs. 4,671, and that the cheque drawn on the 28th November would be returned on payment of the sum of Rs. 4,671. The first cheque was, however, cashed on the 27th of May 1909. This suit was instituted on the 28th March 1912, more than three years after the delivery of the cheque, but less than three years after the cashing

(1) [1901] A C 175 (2) (1901) 26 Bom 294.

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of the same. We are of opinion that limitation runs, not from the date of the delivery of the cheque, but from the date of the receipt of the money by the payee, and that, therefore, Article 62 is no bar to the plaintiffs' claim in respect of this payment. The appeal therefore must be dismissed.

We would add for the consideration of the Government an observation on a question which it has not been necessary to decide having regard to the success of the plaintiffs upon the points raised by them. It is this, whether the Cantonment Taxation Regulations can be regarded as an adaptation of the provisions of the taxation sections of the City of Bombay Municipal Act of 1872 and 1878 in respect of appeals from rates. Those sections allowed an appeal to the Court of Petty Session, that is to the Presidency Magistrate, a judicial tribunal, whereas Regulation 13 of the Poona Regulations gives the appeal to the Cantonment Committee, which is a lay body, one of the most important members of which is the Cantonment Magistrate, from whom the appeal is preferred.

The plaintiffs must have their costs of this appeal and of the next appeal which fails with the failure of this appeal.

Appeal dismissed.

G. B. R.

APPELLATE CIVIL.

FULL BENCH.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Batchelor and Mr Justice Davar

KALYANCHAND LALCHAND AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v. SITABAI KOM DHANASA LAKHMICHAND (ORIGINAL PLAINTIFF), RESPONDENT.* 1913 *November 5*

Evidence Act (I of 1872), section 41—Probate and Administration Act (V of 1881), section 83—Civil Procedure Code (Act V of 1908), section 11—Contentious proceeding for probate—Will not proved—Probate refused—Suit for recovery of property from defendants who held as executors—Judgment in the probate proceeding refusing probate not judgment in rem—Res judicata.

In a contentious proceeding for probate the will produced by the applicants was held not proved and the probate was refused. The applicants appealed to the High Court which dismissed the appeal.

The widow of the deceased thereupon brought a suit for the recovery of the property of the deceased from the defendants who held it as executors under the will and the first Court allowed the claim.

On appeal by the defendants two questions having arisen, namely, (1) whether the judgment refusing probate was as much within the scope and intention of section 41 of the Evidence Act (I of 1872) as a judgment granting probate and (2) whether the judgment in the probate proceeding operated as *res judicata*.

Held by the Full Bench that section 41 of the Evidence Act (I of 1872) was not applicable to the judgment of the appellate Court refusing probate.

Held further that the judgment in the probate proceeding operated as *res judicata* between the parties under section 83 of the Probate and Administration Act (V of 1881) and section 11 of the Civil Procedure Code (Act V of 1908).

FIRST appeal against the decision of G. B. Laghate, First Class Subordinate Judge of Nasik, in original Suit No. 305 of 1910.

The plaintiff sued to recover possession of the property specifically mentioned in the plaint and to

* First Appeal No. 220 of 1912.

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compel the defendants to produce all the property of plaintiff's deceased husband Dhanasa in Court and to recover possession thereof, or in the alternative to obtain a decree against the defendants for the value of the said property together with damages for wrongful possession and detention of it. The plaint alleged as follows :—

Plaintiff's husband Dhanasa Lakhmichand died on the 25th August 1905 leaving behind him two widows, Bhikubai and plaintiff, and considerable property consisting of cash, jewels, clothes, account-books, bonds, etc. All the said property was kept in a treasury in the house in which the widows were residing at the time of Dhanasa's death. Bhikubai died in or about the month of October 1905 and after her death the defendants broke open the treasury, removed all the property that it contained, sold all the cloth of Dhanasa's shop and took away all the ornaments of the plaintiff except gold *patlyas* (wristlets). The plaintiff was at that time a minor and was in mourning. A few jewel ornaments were returned to her through the intercession of friends but the rest of the jewellery was taken away. The defendants had no authority to thus intermeddle with the property. The plaintiff had full ownership over the said property and sued to recover it from the defendants. So far as the plaintiff was aware there was no will made by the deceased Dhanasa. But the defendants set up his will and claimed to be trustees appointed under it. They removed wrongfully and without any pretence of authority the moveable property of the deceased Dhanasa. The defendants applied for probate of the said will, but their application, No. 60 of 1908, was rejected as the will set up was not proved. They appealed to the High Court but there also they were unsuccessful. On the 11th July 1910 the plaintiff served a notice of demand on the defendants but as

they did not comply with the notice, the plaintiff's cause of action arose on the 13th July 1910.

The defendants contended *inter alia* that the plaintiff's husband Dhanasa having made a will and appointed executors thereunder to administer his estate, the plaintiff was not entitled to bring the present suit, that the plaintiff's suit for the recovery of moveable property was barred by three years' limitation, that the plaintiff being more than 20 years old at the time of the suit the claim was time-barred, that the defendants had given a reply to the plaintiff's notice, therefore, the plaintiff had no cause of action against them, that the defendants gave into the custody of the Nazir of the District Court a small brass box which contained the jewellery owned by Dhanasa, that they had with them Rs. 8,500 which belonged to the deceased, that out of the said sum they expended Rs. 2,500 for the deceased and that the rest of the money was with them.

The pleadings in the case gave rise to several issues but the findings of the Subordinate Judge on the principal issues were that the defendants could not resist the plaintiff's claim on the plea of Dhanasa having made a will, even though the so-called will had been held not proved, that it was not competent to them to re-open the question of the genuineness of the said will and even if it had been competent to them to do so, the will was not proved, that the claim was not time-barred and that Rs. 10,077-1-6 were due to plaintiff. The Subordinate Judge, therefore, passed a decree directing the defendants to deliver possession of the property to the plaintiff and to pay her Rs. 10,077-1-6 together with interest at 6 per cent. per annum from the year 1906 upto the date of the satisfaction of the decree with costs of the suit.

The Subordinate Judge in his judgment observed :—

This is a suit by the surviving widow of a deceased Hindu of Yeola to recover from the defendants the moveable property consisting of valuable

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ornaments, cash, cloth, etc., of her husband, alleging that the defendants have wrongfully taken possession of the same under colour of a will said to have been made by the deceased appointing them executors thereunder. Plaintiff denies the existence of any such will as that set up by the defendants. Therefore the first important question is as to the existence of the will. I find that no such will as the defendants rely on, can be held to be proved on the evidence.

The defendants have applied for probate of this alleged will. But exhibit 144, which is the judgment of the Court in the matter of the probate, shows that no will such as has been now put forward could have been made in the then state of health of the deceased testator. The Court remarks in exhibit 144 as follows:—

"In view of the medical evidence as to the testator's state of health and the painful nature of his decease (gangreen) it does not seem possible that he could have given instructions for so detailed a will afterwards. Moreover there is the confusion of the date, the death of both attesting witnesses and the non-production of the will for so long after the death, I therefore hold it not proved."

The Court therefore refused probate. The High Court affirmed the decree of the lower Court.

The judgment of a Court refusing a probate is as much a judgment *in rem* as one which grants it. Such a judgment takes away from the executors named in the will the legal character of executors and from the legatees and beneficiary *their legal character and this result is final as against all persons* interested under the will.

The above judgment therefore is final against the defendants. They cannot now re-open the question of the genuineness or otherwise of the will.

The learned pleader for the defendants refers to 21 Bom. 563 as an authority for this Court to re-open the question but in that case the finding of the High Court was, that the will admitted to probate by the lower Court was *not duly proved.*

In the present case, the finding of the Probate Court was, that the doctor's evidence being believed, there could have been no such will, as that propounded by the defendants. That means that the will propounded could not be held to be genuine. Relying on 16 Mad. p. 383, I hold that the order of the Court refusing probate is conclusive and debars the defendants from setting up the will and re-opening it.

Even if the effect of that judgment were not so and the matter of the genuineness or otherwise of the will is still open, I cannot hold on the evidence on the record that the will in dispute is satisfactorily proved.

The defendants preferred an appeal.

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The appeal was heard by Beaman and Macleod, JJ., who, in referring the case to a Full Bench, delivered the following judgments.

BEAMAN, J. :—Dhanasa died in September 1905. He is alleged to have made a will within forty-eight hours of his death. The executors petitioned for probate in 1908. The widow Sitabai, plaintiff in this suit, opposed, alleging in general terms that there was no will. To understand the vagueness of her caveat it is necessary to state that at the time of her husband's death she was a minor. The executors averred that the will was executed in her presence. She therefore replies in her caveat that no such will was ever executed in her presence, and that what is now propounded as the genuine last will and testament of the deceased Dhanasa, does not seem to be a genuine will. In the circumstances I do not see how she could have been expected to be more explicit, and I think that her contention fairly raised all points upon which the genuineness of a will can be disputed.

The learned District Judge refused probate, clearly on the ground that the deceased Dhanasa could not have been in a sound disposing state of mind, even were the will really made and signed by him. The executors appealed to the High Court, and the appeal was disposed of by Scott, C. J., and Batchelor, J. The appeal was dismissed and probate refused. No definite issue was raised, it very rarely is in appeal to this Court, but it cannot be seriously denied that the appellate Court held that the evidence proved that the alleged testator was not, at the time the alleged will was executed, of a sound disposing mind. This is as clear as though the learned Judges had raised the issue in so many words and answered it in the negative and against the executors. It is necessary to emphasize

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these points in the statement of facts, to clear the way of a certain amount of irrelevant and untenable argument which might otherwise obscure the questions we propose to ask a Full Bench.

The widow Sitabai having come of age has now brought the present suit against the defendants as executors *de son tort*. They have again set up the will and claim to be invested under it with all the legal character of executors.

Two questions then arise.

1. Whether section 41 of the Evidence Act is not applicable to the judgment of the appellate Court and upon a right construction of its terms does not make that judgment conclusive against the present defence of the executors? It is admitted that had the judgment been in favour of the will it would have fulfilled all the requirements of section 41 and conclusively established the legal character of the present defendants. But it is contended that a judgment of a Probate Court refusing probate does not, having special regard to the language of section 59 of the Probate Act, either take away any legal character of the defeated petitioners, or have the like conclusive effect against, which it would admittedly have had for, them.

2. Whether the finding of fact of the appellate Court that the testator was not of sound disposing mind when the alleged will was made, is not *res judicata* between the same parties in the present litigation?

The need of reference to a Full Bench arises out of the decision of Farran, C. J., and Parsons, J., in *Ganesh Jagannath Dev* v. *Ramchandra*[1].

We might, we think, have distinguished that case for the purposes of the second question without much difficulty. But it appears to have been extended since

[1] (1896) 21 Bom. 563.

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in this High Court by judgments which purport to follow it. One of these is an unreported decision of Chandavarkar and Heaton, JJ., in S. A. No. 261 of 1910 which was cited in argument. It appears from the record that although the finding of the Probate Court was against the "genuineness" of the will, the learned Judges of appeal found no difficulty, basing their decision on *Ganesh* v. *Ramchandra*[1] in holding that in a subsequent suit between the same parties the same question of fact might be raised and determined. We are unable to distinguish that case from the case before us. If it be a legitimate extension of *Ganesh's* case, then we find ourselves unable to agree with that decision either.

Both questions are of great general importance. Differences of opinion are likely to arise in answering either, and we have therefore thought this a suitable opportunity to invite an authoritative and final answer to both.

In my opinion the judgment of a Probate Court refusing probate is as much within the scope and intention of section 41 as a judgment granting probate. The distinctions sought to be drawn, though lying on the surface, easily made intelligible and plausible, will not, I submit, bear critical examination. I believe the true rule to be this. In any probate proceeding prosecuted to final judgment, that judgment, whether for or against the will, is a judgment *in rem*, and, if against the will, takes away the legal characters of all those claiming to be executors and legatees under it, as conclusively as a judgment for the will confers such characters upon them, and I further believe that that rule is universal and subject to no exception. Dismissals of petitions for probate for default may be distinguished and for the purposes of this reference

[1] (1896) 21 Bom 563.

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neglected. The reasoning which appears to underlie that part of the decision in *Ganesh* v. *Ramchandra*[1] and has been strongly pressed, with further elaborations upon us by the Honourable and learned Advocate General, is this. Hindu wills in the mofussil unless disposing of property in the town and island of Bombay are not governed by the Succession Act or the Hindu Wills Act. Executors of such wills derive their rights direct from section 4 of the Probate Act, and are under no obligation to apply for probate. Section 187 of the Succession Act has no applicability to them. If in the exercise of a mere option they do apply for probate and it is refused, the judgment even going the length of declaring that the testator was insane when the alleged will was made, or that the alleged will was a forgery, they may still continue to act under this alleged will in the mofussil and set it up in any suit as though the judgment of the Probate Court had never been pronounced.

This appears to me, with all becoming deference, to be utterly fallacious. The fact that the executors of such wills need not obtain probate to meet the requirements of section 187 of the Succession Act ceases to have any bearing or even relevance upon or to cases in which they have availed themselves of their option and deliberately invited the judgment of the Probate Court. Once having done that, once the judgment has been given, it is there, a fact which has to be reckoned with and to which all the legal force and effect with which it is legislatively invested under section 41 of the Evidence Act must be given. The degree and extent of that force and effect must be determined solely with reference to section 41 and to the fact of the judgment, entirely irrespective of any such side consideration as that if the executors had not voluntarily invoked it, it

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never might have been given, never would have been a fact.

The learned Judges who decided *Ganesh Jagannath Dev* v. *Ramchandra*[1] appear to have made this one of the main, if not the main, ground of their conclusion, that in all such cases refusal to grant probate, which is in effect an affirmative finding against the will, no matter how worded or how arrived at (as I hope to show presently) has not the conclusive effect given to all such judgments which "confer or take away" etc., certain legal characters under section 41. With all proper respect I am unable to agree in that conclusion. Logically it might be extended to every case of litigation, if the ground of reason be confined to the option of the plaintiff to sue or not to sue. For no plaintiff is legally compelled to sue. But when a plaintiff does sue and invites the adjudication of the Court, the adjudication and its result is binding upon him. It may be urged that this is not quite a fair representation of the real argument. What is meant is that executors and legatees governed by the Succession Act *must* sue, if they are to obtain any benefit under the will in the character of executor or legatee (section 187) while executors who are not governed by the Act are under no such compulsion. That is perfectly true, but it does not affect, in my opinion, in the slightest degree the validity of the argument, that once having chosen to ask for probate, they must be as bound as any other persons who have asked for the same judicial aid, by the judgment, whether for or against them. It is surely a *reductio ad absurdum* to contend that executors, *not* governed by the Succession Act, may come in and invite the judgment of the Probate Court upon a will, and when that judgment positively declares upon evidence that the will propounded is a forgery, may go back to

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the mofussil and continue to act as executors under it. Even the Advocate General shrank from pushing his argument that length. Yet that length it must go if sound at all. For no true logical distinction can ever be drawn between the particular grounds upon which probate is refused. In every case without exception there is one question and one only for the Court to answer, *will* or *no will*? If it finds that there *is* a will (by which of course I mean a will legal and valid in all respects) it must grant probate. It can only refuse probate on the ground that in law there is *no* will, and the refusal is logically tantamount to the affirmative proposition, founded upon evidence, that there is no will. So that in my opinion it does not make the slightest difference whether probate be refused for failure to comply with the requirements of section 50 of the Succession Act or because the Probate Court held that the will was a forgery, or the testator of unsound mind when it was made. (I may point out merely as a curiosity of law, that in the particular case with which Farran, C. J., and Parsons, J., were dealing, probate was refused for failure to have complied with the requirements of section 50 of the Succession Act, while, so far as I can gather from the facts that section had no applicability at all to the case.) But I am now entering upon another line of reasoning which does not properly belong to the ground that if an executor has an option to apply for probate or not and does apply the resultant judgment is on a different legal footing, has different legal consequences, from a like judgment given on the application of a person who is (virtually) compelled to obtain probate under section 187.

To say that in the former case the executor is in no worse position after asking and obtaining the final decision of a competent Court against the will, appears to me to be logically untenable, to be radically unsound,

regarded either theoretically or practically, and surely to involve absurd consequences.

2. . It is next contended that since section 59 of the Probate Act expressly confers finality and conclusiveness upon a judgment in favour of the will, while the Act is silent as to the effect of judgments against a will, there is a plain and designed legislative distinction. The latter cannot be regarded as having the same legal effect as the former. The answer to this is short and decisive *What is wanting in the Probate Act is supplied in* section 41 of the Evidence Act. As to that it is urged that the section when it speaks of a judgment "taking away" any legal character, means doing so expressly as upon a revocation I think that that is much too limited and technical a construction In construing and applying the section we surely must look at what has actually been done. Holding that a will is a forgery for example is, to all intents and purposes as express a taking away of all rights rooted in it, as a declaration that the will is genuine and therefore entitled to probate is an express conferring of such rights In reason there is *no* distinction, nor can one be suggested if extreme cases like this are put It is only in cases where the ground of refusal is less definite, confined, let us say, to formalities of execution, rather than to inherent turpitude, that any room can be found for such *arguments. But here again it is easy to trace and* expose their radical fallacy For I repeat, and without much fear of contradiction, that rightly analyzed what every Probate Court has to decide is one thing and one thing only, *will or no will?* A will is just as much *not* a will in the eye of the law if essential formalities have not been complied with, as though it be found affirmatively to have been a forgery. So that the refusal to grant probate implies the affirmative finding on the evidence, *no will*. And that being found it follows that

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the Court by declaring that there is no will takes away all legal characters which are referable exclusively to the will.

Pushed to its logical conclusion the principle contended for by the defendants would warrant executors, not governed by the Succession Act, inviting the judgment of the Probate Court on the same will year after year thus offending against the universal principle of *res judicata*. And for all reason to the contrary I do not see why all executors should not be in the same case, that is to say, at liberty to try and try again, no matter how often the Probate Court had pronounced against the will. Why should one judgment affirming a will be final and conclusive against all the world, while a hundred judgments against a will should have seemingly no legal effect whatever? The contention that judgments refusing probate do not take away any legal character from petitioning executors and legatees could hardly be used generally; in the exceptional case with which we are dealing, namely, where the executors are not under the disabilities of section 187 and therefore need not take out probate at all unless they desire to get in debts, is shown, I hope, to rest upon reasoning equally unsound and untenable. Indeed looked at merely as a logical argument there is much more to be said for executors bound by section 187 than for those who are not. In the latter case the argument is that since they have rights as executors independently of probate, refusal to grant them probate cannot take away such rights. But that is exactly what it does. It would be a much more ingenious, and for the mere purposes of dialectic a much sounder argument to say that executors and legatees bound by section 187 have no rights at all under the will until probate has been granted, therefore refusal to grant probate does not take away any of their rights or characters under the

will, because they never had any. Which (as is the other argument but more so) is absurd. In my opinion where the question *will or no will* is submitted to the decision of a Probate Court, tried out and finally determined by that Court, its judgment either way is conclusive, within the meaning of section 41 of the Evidence Act. This too, in my opinion, is by far the most important of the two questions we are submitting to the Full Bench. For if my view be adopted we shall have a clear rule of universal applicability about which there will be no room for further argument or uncertainty, the most fruitful sources of litigation. Whereas if in all such cases, I mean where probate has been refused, the judgment is not within the scope of section 41, the parties relying on it have to fall back upon the general principle of *res judicata*, matters of difficulty and uncertainty are likely often to arise.

If, for example, in the present case the judgment of the High Court on the probate petition of the executors be held to be final and conclusive against them under section 41 (as with respect I submit it ought to be) there is an end of the matter. There is no will, there are no executors, no legatees, and the present defence is not available to the defendants.

The point has recently been considered by a division bench of the Calcutta High Court (Mookerjee and Carnduff, JJ.) in *Ramani Debi* v. *Kumud Bandhu*[1]. I do not consider it necessary to examine cases in detail, where the point is, as it is here, one of simple construction and correct reasoning only. But while the tenor of Mookerjee, J.'s judgment will be found, I think, strongly to support my view, a view which also has the support of American Courts, all these Judicial pronouncements seem to me to fall a little short of

[1] (1910) 14 Cal W N 924

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complete accuracy. Looking to such authorities it is fair to represent them as agreeing generally that judgments refusing probate, on the merits, are as much judgments *in rem* as judgments granting probate. But this will always leave room for a certain amount of foggy thought and argument. After all what *are* these judgments *in rem* but a part of the law of *res judicata*? Just as every judgment *inter partes* upon the same materials is *res judicata* between them and their representatives, so in a special class of cases the judgment is *res judicata* not only *inter partes* but *extra partes contra mundum.* Even so the judgments *in rem* are no more than *res judicata.* And we thus arrive at once at a simple general principle which will do away with all need to argue about particular exceptions on any other ground. It is this. In every case where the judgment is *in rem,* if it would have been, *res judicata inter partes,* it is also *res judicata* against all the world. That disposes of all such cases as Mookerjee, J. was considering, and dispenses with the need of arguing them. What would not be *res judicata inter partes* (*e. g.* dismissal for want of prosecution) cannot be *res judicata* against anybody. And this brings me back to the general rule I began by stating that where probate proceedings have been prosecuted to judgment (in other words where that judgment would, upon the facts and contentions before the Court, be *res judicata inter partes*), it must always be *res judicata contra mundum.* But until some clear view is thus obtained of the fundamental principles underlying any part of the law, its practical administration is almost sure to be complicated by drawing distinctions upon particular cases, most of which, in the argument here, can easily, I think, be shown to be no true distinctions at all.

I will now deal with the second question referred to the Full Bench. Since I would use the judgment of

the appellate Court in the probate proceedings under section 11 against the defendants, it follows from the principles I have stated that I consider the finding of fact arrived at by their Lordships the Chief Justice and Batchelor, J., a *res judicata* and binding upon the present defendants. What their Lorships found (it is merely idle to dispute this because no definite issue was framed) was this that having regard to the medical evidence the testator Dhanasa was not of sound mind when the will was alleged to have been made. Therefore there was no will. If that be *res judicata* in the present case there is an end of the defence. Again, the defendants rely on *Ganesh* v. *Ramchandra*[1]. But while the learned judges did decide in that case that the finding of the Court against the will on the probate proceedings was not *res judicata* against the executors in a subsequent suit, they did not find that no finding of a Probate Court could ever be *res judicata*. In the opinion of their Lordships there was no issue affecting the genuineness of the will either raised or tried, and therefore no *res judicata*. With all respect I submit that that decision, even so restricted, is logically indefensible The Court of appeal deciding the probate application held that to make the will, a will legally, certain formalities prescribed in section 50 of the Succession Act were indispensable and had not been complied with. It is true that section 50 did not, as far as I can now ascertain, apply at all, but that has nothing to do with the principle of the judgment in *Ganesh* v. *Ramchandra*[1] If it had applied then the finding of the appeal Court on the probate was in effect that its requirements had not been complied with, and that as a result there was no will. That I submit is in all respects as much a finding of fact as a finding that the will was a forgery. And in

(1) (1896) 21 Bom 563

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complete accuracy. Looking to such authorities it is fair to represent them as agreeing generally that judgments refusing probate, on the merits, are as much judgments *in rem* as judgments granting probate. But this will always leave room for a certain amount of foggy thought and argument. After all what *are* these judgments *in rem* but a part of the law of *res judicata?* Just as every judgment *inter partes* upon the same materials is *res judicata* between them and their representatives, so in a special class of cases the judgment is *res judicata* not only *inter partes* but *extra partes contra mundum.* Even so the judgments *in rem* are no more than *res judicata.* And we thus arrive at once at a simple general principle which will do away with all need to argue about particular exceptions on any other ground. It is this. In every case where the judgment is *in rem*, if it would have been *res judicata inter partes*, it is also *res judicata* against all the world. That disposes of all such cases as Mookerjee, J, was considering, and dispenses with the need of arguing them. What would not be *res judicata inter partes* (*e. g.* dismissal for want of prosecution) cannot be *res judicata* against anybody. And this brings me back to the general rule I began by stating that where probate proceedings have been prosecuted to judgment (in other words where that judgment would, upon the facts and contentions before the Court, be *res judicata inter partes*), it must always be *res judicata contra mundum.* But until some clear view is thus obtained of the fundamental principles underlying any part of the law, its practical administration is almost sure to be complicated by drawing distinctions upon particular cases, most of which, in the argument here, can easily, I think, be shown to be no true distinctions at all.

I will now deal with the second question referred to the Full Bench. Since I would use the judgment of

to prevent matters of great importance being decided incidentally, as they often are in Courts of inferior jurisdiction, so as afterwards to exclude those matters from the cognizance of Courts of superior jurisdiction. That is the single reason for the rule. But it has no more than a verbal application to such a case as this. Here the District Judge, who first decided the question of fact, was himself competent to try the subsequent suit, in which that question of fact would arise, and *a fortiori* their Lordships who heard the appeal were competent, and no higher tribunal in this country could be found for the trial of the issue. In my opinion the objection has no real substance, though it lends itself to a great deal of technical argument. The District Judge remains the District Judge when exercising his probate jurisdiction; there is no separate Court. Similarly the Judges of this High Court are sitting in the exercise of their appellate jurisdiction as much to deal with these, as with any other first appeals.

As to the first objection, it is met by the judgment of the Privy Council in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*[1]. True in that case the *res judicata* arose out of an execution proceeding which is normally part of a suit; but that was not the ground upon which the judgment proceeded. Broadly that ground was that section 11 does not contain the whole law of *res judicata*, which is general and of universal application. In other words, that in a proper case, Courts would be perfectly justified in neglecting the actual words of section 11, if the substance showed that the section ought to be applied. And that is certainly the case here, I mean, if there is any real difficulty in the words. I do not agree that there is, for I think that mere quibbling apart, these contentious probate proceedings are in effect suits. However that may be, I am

[1] (1883) L. R. 11 I. A. 37.

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emphatically of opinion that the substance and reason of the matter before us makes it as clear a case of *res judicata* as ever could be. Here is a simple question of fact offered for trial by the present defendants to the District Judge and found against them. They take it up on appeal to the High Court and again the finding is against them. Are they to be allowed now to ask a second District Judge it may be, and a second bench of this High Court to try the identical question of fact between the same parties, on virtually the same materials? Surely not. In this suit the defendants have added three more witnesses, but that in my opinion does not make the slightest difference. The decisions of both the Courts in the probate rested solely on the medical evidence That is as it was then, and therefore there is really no new material before us affecting the ground of the previous judgments. But even if there were, I should still remain of the opinion that no such evidence could be led, because no such issue could be raised again, no such question re-agitated. In my opinion however it is much more important to have the first question answered in the way I propose. For, if it be only on the ground of *res judicata* that the judgment of the Probate Court bars the defendants, it would still be open to lagatees to reopen the question upon exactly the same materials, and if there were a dozen legatees and a dozen executors I see no reason in principle why there should not be two dozen suits all hinging upon the identical question of fact, namely whether or not there ever was a will.

I cannot bring myself to believe that such a result could be in the contemplation of the legislature, or that it would be consistent with the administration of this branch of the law upon sound general principles.

In my opinion then the judgment of this appeal Court on the probate, holding that the testator was not

of sound disposing mind, is relevant and conclusive against the present defendants under section 41.

I am also of opinion that even if this be not so, the finding of fact arrived at by the learned Judges of appeal in the Probate suit, (I call it so intentionally) is *res judicata inter partes* in the present suit. The parties are the same.

MACLEOD, J.:—For the reasons given by my brother Beaman I am of opinion that the two questions which we think should be referred to the decision of a Full Bench ought to be answered in the affirmative.

The reference was argued before the Full Bench composed of Scott, C. J., and Batchelor and Davar, JJ.

Strangman (Advocate General) and *Kanga* instructed by *Motichand* and *Devidas* with *R. R. Desai*, *D. S. Varde* and *M. V. Bhat* for the appellants (defendants).

Strangman (Advocate General).—The will in question was made in the mofussil. It is governed by the Probate and Administration Act and not by the Hindu Wills Act. It was, therefore, not necessary to the executors to obtain probate at all. The property of the testator vested in the executors immediately on the death of the testator under section 4 of the Probate and Administration Act corresponding to section 187 of the Indian Succession Act which is incorporated in the Hindu Wills Act

Section 41 of the Indian Evidence Act has no application here. It is true that by reason of section 187 of the Indian Succession Act, the final judgment of a competent Court in the exercise of probate jurisdiction to grant probate or letters of administration would fall within the terms of section 41 of the Evidence Act, but it is extremely doubtful whether, in the event of the persons governed by Probate and Administration Act, it could be said under section 11, if the Court has

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conferred any legal character on any person, that legal character being already conferred by section 4 of the Probate and Administration Act. What we are concerned with here is not "conferring" but "taking away". Assuming for a moment that section 41 of the Evidence Act applies to Probate and Administration Act, "taking away" would arise only when probate or letters of administration which had already been granted were taken away. There is no question of revocation of grant in the present case. Further section 41 refers to declaring any person entitled to any legal character and does not refer to any declaration "not entitled," etc.

In the present case there was no necessity at all for the executors to take out probate. The refusal to grant probate left the executors as they were.

Under the Probate and Administration Act, a grant is final and conclusive under section 59. There is no corresponding section making the refusal to grant final and conclusive.

Under section 41 of the Evidence Act "taking away" means taking away of something granted by the Court. The refusal of probate only means that the Court declines to grant probate. Where a right is taken away there must be declaration to that affect in the order.

As to *res judicata*: Probate proceedings, when contentious, do not amount to a suit. Only they take the form of a suit: section 83 of the Probate and Administration Act. The Probate Court as such is not competent to try the second suit. Law of *res judicata* is not a law of procedure any more than the law of limitation: *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*[1], *Mirza Kurratulain Bahadur* v. *Peara Saheb*[2].

Raikes and *Wadia* with *D. A. Khare* and *A. G. Desai* for the respondent (plaintiff).

[1] (1883) L. R. 11 I. A. 37. [2] (1905) L. R. 32 I. A. 244.

Raikes :—The question that has to be considered is, "is the judgment refusing a probate a judgment *in rem*?" After all a judgment *in rem* is an estoppel by record against all the world. Estoppel by record must be mutual. The judgment if it estops the one party one way, must estop the other party the other way. In section 41 of the Evidence Act the legislature has proceeded on the footing of this principle and hence they have not made the negative part express in the section.

The character of an executor accrues to him at the moment of the testator's death. He acts as an executor. By the probate proceedings he does not ask that that character should be declared. If the Court refuses probate, then the judgment takes the character away from the executor which he had assumed and leaves him an executor *de son tort*.

As to *res judicata* : Probate proceedings are a suit within the ordinary meaning of the term "suit". The term is not defined either in the Civil Procedure Code or in the General Clauses Act. The probate proceedings are to take the form of a suit: section 83 of the Probate and Administration Act, or a regular suit: section 261 of the Indian Succession Act.

Even supposing they are not a suit within the meaning of section 11 of the Civil Procedure Code, still if the section does not apply to *tidem verbis*, the principle underlying the section would apply.

The judgment of the Full Bench was delivered by

SCOTT, C. J. :—With regard to the first question referred we are of opinion that section 41 of the Evidence Act is not applicable to the judgment of the appellate Court. The finding of a Court that an attempted proof has failed is not a judgment such as is contemplated in that section. The only kind of negative judgment which is contemplated is that which expressly

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takes away from a person the legal character which has up to that time subsisted. That is not the case with the judgment in question here.

With regard to the second question we are of opinion that the judgment operates as *res judicata* between the parties. The contention was advanced on behalf of the appellants that the probate proceedings, in which the previous judgment was pronounced, were not a suit within the meaning of section 11 of the Civil Procedure Code, but section 83 of the Probate and Administration Act provides for the form which contentious probate proceedings shall take. They must take the form as nearly as may be of a suit according to the provisions of the Civil Procedure Code, in which the petitioner for probate or letters of administration shall be the plaintiff, and the person who may have appeared to oppose the grant shall be the defendant. There is no definition of the word "suit" either in the Civil Procedure Code or in the General Clauses Act, and we are of opinion that as contentious probate proceedings must take the form of a suit, they constitute a suit within the meaning of section 11 of the Civil Procedure Code. The contention appears to be a novel one. It was not advanced, so far as we can gather from the reports, in the case of *Mirza Kurratulain Bahadur* v. *Peara Saheb*[1] nor has it, so far as we know, ever been advanced before in this Court.

Order accordingly.

G. B. R.

[1] (1905) L. R. 32 I. A. 244; 33 Cal. 116.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

KALURAM PIRCHAND MARWADI (ORIGINAL PLAINTIFF), APPELLANT, *v* GANGARAM SAKHARAM SHET SHIMPI (ORIGINAL DEFENDANT), RESPONDENT.° 1913. *November* 12.

Civil Procedure Code (Act V of 1908), section 97—Preliminary decree—Appeal—Findings on preliminary issues—No appeal lies from findings—Decree, drawing up of—Duty to draw up decree is of the Court—Civil Circulars (1912) clause 159 †

In a suit for accounts the first Court recorded findings on certain preliminary issues and ordered accounts to be taken on the basis of those findings. No preliminary decree was drawn up by the Court and none was asked for by the plaintiff's pleader. The accounts were next taken by a Commissioner and a decree was passed in accordance with his report dismissing the suit. The plaintiff appealed against the final decree and urged objections against findings on preliminary issues

Held, that the plaintiff was not barred of his right to urge objections against the findings on preliminary issues, for under the Civil Procedure Code (Act V of 1908), section 97, his right to appeal arose only when there was a decree based on those findings. That the practice in the mofussil Courts was in accordance with the provisions of the Civil Procedure Code and Civil Circulars, clause 159, *viz*, that the Court was to draw up the decree, and that the pleaders, if any, in the case were to see that it was in accordance with the judgment. There is no provision requiring a party or his pleader to move the Court to draw up a decree and mere omission to ask the Court to do that which it is the duty of the Court to do on its own motion cannot affect his right to appeal.

SECOND appeal from the decision of N. B. Mujumdar, First Class Subordinate Judge, A. P., at Dhulia, confirming the decree passed by R. B. Khangaonkar, Subordinate Judge at Amalner.

Suit for account.

° Second Appeal No. 297 of 1913

† The clause runs as follows —

In cases in which pleaders are employed it is their duty to see that decrees and final orders are properly drawn up in conformity with the terms of the judgment, and every facility should be given them for that purpose and for being heard on the subject in cases of doubt and difficulty . . . .

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The plaintiff sued the defendant for accounts and to recover the balance due. The defendant owned a ginning factory, and the plaintiff was a customer of his who had his cotton ginned at the factory. The defendant contended that if an account were taken between the parties, the plaintiff would be found indebted to him. Contentions were raised in the case about an oral agreement between the parties, custom of trade as to certain items and other incidental matters.

On the 30th June 1910, the Court of first instance decided the several contentions, and ordered an account to be taken on the basis of those findings. No preliminary decree was drawn up in terms of those findings; and no such decree was asked for by the parties. A Commissioner was appointed to take the accounts. The Court accepted the report made by the Commissioner and dismissed the suit on the 26th September 1910.

The plaintiff appealed from the final decree and contended that the findings recorded by the first Court on the 30th June 1910 were erroneous. The lower appellate Court held that it was not open to the plaintiff to question the validity of findings, as he did not appeal from the findings and his conduct in not asking the Court to draw up a decree in terms of those findings amounted to a waiver of his right to appeal. As the plaintiff had nothing to say against the Commissioner's report, the lower appellate Court dismissed his appeal.

The plaintiff appealed to the High Court.

M. V. Bhat, for the appellant:—The Code of Civil Procedure lays the duty of drawing up a decree on the Court. See section 33, and Order XX. The practice in the mofussil Courts is to the same effect. As the plaintiff had no duty in drawing up the decrees there could be no waiver on his part by absence of the decree. See *Sakharam Vishram* v. *Sadashiv Balshet*[1].

[1] (1913) 37 Bom. 480.

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As the other side has not appeared, the attention of the Court is drawn to the following cases which are against me. *Govind Ramchandra* v. *Vithal Gopal*[1]; *Bai Divali* v. *Shah Vishnav Manordas*[2] and *Sidhanath Dhonddev* v. *Ganesh Govind*[3].

The respondent did not appear.

SHAH, J.:—The plaintiff brought the present suit for an account and for recovery of the balance due by the defendant, who was the owner of a ginning and pressing factory and with whom the plaintiff had dealings as a customer. Several issues relating to the agreement between the parties, custom of the trade, interest and other details were raised by the trial Court. After recording findings on these issues the Court ordered accounts to be settled as per findings on the 30th June 1910. It was also ordered on the same day that the plaintiff ought to apply for commission within four days from that date or put in his own statement of accounts so that defendant may check it and ascertain its correctness. Ultimately a Commissioner was appointed to take accounts. He took accounts and found that a certain sum was due by the plaintiff to the defendant. The Court accepted the Commissioner's report and dismissed the plaintiff's suit with costs on the 26th September 1910.

The plaintiff appealed to the District Court against the final decree and urged objections to the findings recorded by the trial Court, in accordance with which the account was taken between the parties The lower appellate Court refused to allow the appellant to urge his objections on the ground that the order dated 30th June 1910 amounted to a preliminary decree, and that the plaintiff having failed to take steps to appeal against the preliminary decree, he must be deemed to have

(1) (1912) 36 Bom 536

(2) (1909) 34 Bom. 182

(3) (1912) 37 Bom 60

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waived his right to appeal against the preliminary decree based upon these findings. The lower appellate Court accordingly confirmed the decree of the trial Court.

The present second appeal is preferred by the plaintiff against the decree of the lower appellate Court, and it is urged that the view taken by that Court as to the plaintiff's right to object to the findings in his appeal against the final decree is not correct. The defendant, though served, has not appeared. The learned pleader for the appellant, however, has argued the case before us fairly.

After a careful consideration of the provisions of the Code of Civil Procedure and the decisions of this Court, I am of opinion that the appellant's contention ought to be allowed. In this case there was no preliminary decree drawn up in pursuance of the interlocutory judgment of the 30th June 1910. The plaintiff took no steps to have the preliminary decree drawn up. Under the Code, the right to appeal arises when there is a decree, *i. e.*, when there is a formal expression of the adjudication. There is no right to appeal from any preliminary judgment of the kind we have here. The obligation to appeal against a preliminary decree, by which a party is aggrieved, contemplated by section 97 of the Code, arises when the right to appeal accrues and not before that. So far the point presents no difficulty and in the absence of any preliminary decree, it is clear that the party appealing against the final decree would have a right to object to findings, which may have been recorded in the preliminary judgment.

It is said, however, that it is the duty of the party or his pleader to ask the Court to draw up a preliminary decree and that if he fails to do his duty the party must be deemed to have waived his right to appeal. The lower appellate Court has drawn that inference, but I

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am unable to accept it. Under the Code it is the duty of the Court to draw up a decree. The Civil Circulars also proceed upon this view of the provisions of the Code. There is no express provision of law which requires the party concerned to move the Court to draw up a decree. The only provision relating to the pleader's duty in this respect is to be found in clause 159 of the Manual of Civil Circulars (1912). This clause provides that "in cases in which pleaders are employed it is their duty to see that the decrees and final orders are properly drawn up in conformity with the terms of the judgment and every facility shall be given them for that purpose and for being heard in cases of doubt and difficulty." So far as I know this provision has always been understood—and, in my opinion, rightly understood—as requiring the pleaders employed in a case to see that the decree is in accordance with the judgment, when it is drawn up, and before it is signed, by the Court as required by the Code. It is not as if the decree is to be drawn up only *when applied for* as on the Original Side of this Court: see Rule 245 of the Rules and Forms of the Bombay High Court (1909). The practice in the mofussil Courts is in accordance with the provisions of the Code and the Civil Circulars, *viz.*, that the Court is to draw up the decree, and that the pleaders, if any, in the case are to see that it is in accordance with the judgment. Thus it will appear that there is no provision requiring the party or his pleader to move the Court to draw up a decree. Under these conditions I am unable to say that a party waives his right to appeal, when he or his pleader omits to ask the Court to draw up a preliminary decree. Mere omission on his part to ask the Court to do that, which it is the duty of the Court to do of its own motion, cannot affect the right of the party to appeal, which can arise only when the decree is drawn up by the Court.

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In this case there is no express waiver. And it can be *implied when the person entitled to anything does* or acquiesces in something else which is inconsistent with that to which he is entitled. The appellant in this case has done nothing, which can be said to be inconsistent with that to which he is entitled, nor has he acquiesced in any such thing. His right to appeal did not arise as no preliminary decree was drawn up. The omission on his part to move the Court to draw up the preliminary decree is not inconsistent with his right to appeal, when it arises.

The lower appellate Court has relied upon the case of *Govind Ramchandra* v. *Vithal Gopal*[1]. Under similar circumstances a different view was taken of the duty of the party to apply to the Court to have a decree drawn up and of the inference of waiver to be drawn from the omission of the party to do that duty in the case of *Sakharam Vishram* v. *Sadashiv Balshet*[2]. I, therefore, feel myself free to decide this appeal in conformity with the conclusion which I have come to in this case. I have stated my reasons for holding that in the absence of any statutory provision requiring the party or his pleader to ask the Court to draw up a decree in pursuance of a judgment no inference adverse to the party as to his right to appeal ought to be drawn from an omission on his part to ask the Court to draw up the decree.

The result, therefore, is that the decree of the lower appellate Court is reversed, and the case remanded to that Court for disposal according to law. Costs of this appeal to abide the result.

HEATON, J. :—I am of the same opinion.

Decree reversed.

R. R.

(1) (1912) 36 Bom. 536.

(2) (1913) 37 Bom. 480.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

AHMEDBHOY HABIBBHOY (ORIGINAL CLAIMANT), APPELLANT, *v* WAMAN DHONDU AND OTHERS (ORIGINAL COUNTER-CLAIMANTS), RESPONDENTS.° 1913. *November* 18.

Land Acquisition Act (I of 1894), section 54—Bombay Civil Courts Act (XIV of 1869), section 16—Civil Procedure Code (Act V of 1908), section 96 (1)—Reference to Assistant Judge—Award not exceeding Rs 5,000—Appeal to the District Judge—Second appeal to the High Court not maintainable.

A reference having been made in accordance with the provisions of the Bombay Civil Courts Act (XIV of 1869) to the Assistant Judge, he tried the reference and made an award under the Land Acquisition Act (I of 1894) which did not exceed Rs 5,000 An appeal was presented against the said award to the District Judge and he having decided the appeal, a second appeal was preferred to the High Court.

Held, that under section 16 of the Bombay Civil Courts Act (XIV of 1869) the Court authorized to hear appeals from the Assistant Judge's Court where the value of the subject-matter was less than Rs 5,000 was the District Court and not the High Court and no second appeal being expressly given by the Act, the (second) appeal to the High Court was not maintainable

SECOND appeal against decision of C. E. Palmer, District Judge of Thana, confirming the decree of A. W. Varley, Assistant Judge, in the matter of a reference made by the Assistant Collector, Prant Bassein, under section 18 of the Land Acquisition Act (I of 1894).

Certain lands were acquired by Government in the village of Malad in the Thana District for the purposes of the Bombay, Baroda and Central India Railway Company. The Assistant Collector made an award granting compensation to be given to claimants whose lands were thus acquired. Disputes having arisen between Ahmedbhoy Habibbhoy, the khot of the village, and the other claimants, who were *sutidars* (permanent tenants) of the lands, as to who was entitled to the compensation, the khot claiming the whole or at least

° Second Appeal No 565 of 1911.

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one-third of it and the other claimants claiming the whole for themselves, the Assistant Collector made a reference to the Assistant Judge of Thana under section 18 of the Land Acquisition Act, the amount of the award being less than Rs. 5,000. The Assistant Judge after inquiry held that the khot was entitled to a sum equivalent to twenty-five times of the fixed assessment of the lands acquired and the remainder was to be divided among the tenants.

On appeal by the khot to the District Judge, the decision of the Assistant Judge was confirmed.

The khot preferred a second appeal.

D. G. Dalvi for the appellant (claimant khot).

R. W. Desai for the respondents (counter-claimants tenants):—We raise a preliminary objection. No second appeal lies in this case. The original reference was heard and decided by the Assistant Judge. The amount of the compensation being less than Rs. 5,000 an appeal from the Assistant Judge's decision lay to the District Court and not to High Court: section 16 of the Bombay Civil Courts Act as amended by section 2 of Act I of 1900, *Narayan Ravji* v. *Gangaram Ratanchand*[1]. Accordingly the appellant presented an appeal to the District Court at Thana and from the decision of that Court the present second appeal is filed. No such second appeal is allowed by law. Section 54 of the Land Acquisition Act allows only one appeal. The right of appeal is the creation of the statute and no right to a second appeal being given by that statute, a second appeal cannot lie: *Nathubhai Narandas* v. *Manordas Laldas*[2].

D. G. Dalvi for the appellant (claimant khot):—The objection seems to be correct. There can be no second appeal.

(1) (1909) 33 Bom. 664. (2) (1911) 36 Bom. 360.

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SCOTT, C. J. :—In this case an award was made under the Land Acquisition Act which did not exceed Rs. 5,000. The reference to the Court was, in accordance with the provisions of the Bombay Civil Courts Act, to the Assistant Judge, and he tried the reference. Under the same Act an appeal lay to the District Judge as the amount or value of the subject-matter did not exceed Rs. 5,000, and he heard the appeal. That was analogous to an appeal from an original decree.

An appeal is now preferred from the decision of the District Judge to the High Court, and the question is whether such appeal lies An appeal lies only if it is expressly given by the Act It does not lie merely by analogy to appeals in Civil suits see *Rangoon Botatoung Company* v. *The Collector of Rangoon*(1)

Now, an appeal lies to the High Court in proceedings under the Land Acquisition Act under the conditions specified in section 54 of that Act. That section says: "Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act." The section is there obviously dealing with appeals from original decrees, and impliedly it recognizes that there may be cases in which the appeal from the original decree will not lie to the High Court.

Turning to the provisions of the Civil Procedure Code relating to appeals from original decrees we find that section 96 (1) provides : "Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court." Now, under section 16 of the Bombay Civil Courts Act, the Court authorized

(1) (1912) L. R. 39 I. A. 197.

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to hear appeals from the Assistant Judge's Court where the value of the subject-matter is less than Rs. 5,000 is the District Court and not the High Court. We are, therefore, of opinion that the preliminary objection is good that the appeal to the High Court is not maintainable. One set of costs.

Appeal dismissed.

G. B. R.

APPELLATE CIVIL.

Before Mr Justice Heaton and Mr. Justice Shah.

1913. *December 2.*

RAMCHANDRA ANANDRAO KULKARNI (ORIGINAL DEFENDANT No. 2), APPELLANT, v. PANDU WALAD DAGDU TELI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

Special appeal—Civil Judge at Vinchur—Appeal to High Court—Regulation IV of 1827, section 99†—Regulation XIII of 1830, section 5‡—Civil Procedure Code (Act V of 1908), sections 4 and 100.

A special appeal, on the grounds mentioned in section 100 of the Civil Procedure Code (Act V of 1908), lies to the High Court, from the decision of the Civil Judge at Vinchur.

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* First Appeal No 296 of 1912.

† The material portion of the section runs as follows :—

99. *First.*—If in a suit or appeal not ordinarily appealable to the Sudder Dewanee Adawlut, a decree is passed in any Zilla Court, which appears on the face of it to be contrary to or unwarranted by the Regulations, which appears to be inconsistent with the general usage of the country, or with the Hindu or Mahomedan law, in questions depending on such law, or if the decree involves some point of general interest or importance not before decided by the Sudder Dewanee Adawlut, or if strong probable grounds of grievance exist, from whatever cause, it shall be competent to the Sudder Dewanee Adawlut to admit a special appeal in the case.

° ° ° °

‡ The section runs as follows :—

5. A special appeal is open in all cases to the Sudder Dewanee Adawlut under the rules provided in Chapter XXII, Regulation IV, 1827, for the admission of special appeals

APPEAL from the decision of Ganpatrao Madhavrao Vinchurkar, Civil Judge at Vinchur.

Suit for declaration.

The plaintiff filed a suit to obtain a declaration that certain lands were liable to be attached and sold in execution of his decree against the defendants. The suit was instituted in the Court of the Civil Judge at Vinchur who granted the declaration.

The defendants appealed to the High Court. The appeal was registered as a first appeal.

S. S. Patkar, Government Pleader, for the appellant.

R. R. Desai, for the respondents.

At the hearing a preliminary objection was raised that no appeal lay.

SHAH, J.:—This is an appeal by defendant No. 2 against the decree passed by the Court of the Civil Judge at Vinchur in suit No. 85 of 1912. A preliminary objection is raised by the plaintiffs that no appeal lies from the decree of the lower Court, and that if a special appeal lies it can lie only on the grounds mentioned in clause 99 of Regulation IV of 1827. The appeal is registered as a first appeal.

The lower Court in this case exercises its powers under Regulation XIII of 1830. It has been ascertained by this Court in the unreported case of *Bhika* v. *Fakirchand*[1] that the Jagirdar of Vinchur is enumerated in the list furnished by Government, and the fact has not been disputed before us. It is clear, therefore, that under the first clause of section 3 of Regulation XIII of 1830 his decision is final, and that no first appeal in the ordinary sense lies to this Court. It is equally clear that under section 5 of the same Regulation a special appeal is open in all such cases to this Court. In two unreported cases (*Bhika* v. *Fakirchand*[1] and

(1) F. A. No. 4 of 1908, Unreported.

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Mahadu v. *Keshav*(1)) it has been held that a special appeal lies to this Court.

It was argued on behalf of the plaintiffs-respondents that as the Regulation IV of 1827, which contained the provisions relating to special appeals, had been repealed, and as there was no provision in the present Code of Civil Procedure relating to special appeals, the right of appeal provided in clause 5 of Regulation III of 1830 was practically non-existent. This contention appears to me to be wholly untenable. In the first place the right of appeal expressly conferred by a statute cannot be negatived in this manner. Indeed, if necessary, the scope of the special appeal provided by Regulation XIII of 1830 may have to be determined by a reference to the provisions of the repealed Regulation IV of 1827. But a reference to the statutes relating to Civil Procedure from time to time shows that though the expression 'special' appeal does not occur in the present Code, broadly speaking the provisions relating to second appeals correspond to the provisions relating to special appeals in Regulation IV of 1827. It is, therefore, not accurate to say that there is no provision in the present Code relating to special appeals as contemplated by Regulation XIII of 1830

It was next urged that even though a special appeal might lie to this Court, it could be entertained only on the grounds mentioned in clause 99 of Regulation IV of 1827. In neither of the two unreported cases mentioned to us in the argument is the nature of the special appeal distinctly specified. It may be that the point was not raised in those cases or that it was assumed that a special appeal was substantially the same as a second appeal. The point has been raised and argued before us. It is necessary to determine the nature

(1) F. A. No. 9 of 1908, Unreported.

of the special appeal contemplated by Regulation XIII of 1830 before we can decide the present appeal. We have come to the conclusion that a special appeal under Regulation XIII of 1830 is synonymous with a second appeal under the Code of Civil Procedure, and should be heard and determined in the same manner as a second appeal is heard and determined. In other words the special appeal lies to this Court only on the grounds mentioned in section 100 of the Code of Civil Procedure It is not necessary to refer in detail to the relevant sections of different Acts. It is enough to say that a careful perusal of section 99 of Regulation IV of 1827, sections 372 and 381 of Act VIII of 1859, the repealing Act XII of 1873 (so far as it repeals in section 5 of Regulation XIII of 1830 the words "under the rules provided in Chapter XXII, *Regulation IV of 1827, for* the admission of special appeals"), sections 7 and 581 of Act X of 1877, sections 7 and 581 of Act XIV of 1882 and sections 4 and 100 of Act V of 1908, will show that 'special appeal' contemplated by the Regulation corresponds to 'second appeal' under the Code of Civil Procedure. Barring slight alterations it is clear that the limitations of a special appeal coincide with the limitations of a second appeal. I am inclined to think that after Act VIII of 1859, special appeals under Regulation XIII of 1830 were to be heard according to the provisions of section 372 of the Act, and not of section 99 of Regulation IV of 1827, as apparently there was nothing inconsistent in the rules relating to special appeals in the Act with the specific provisions of Regulation XIII of 1830. It is not necessary, however, to come to a definite conclusion on this point. It is quite clear that after the repealing Act XII of 1873 there was nothing inconsistent in the Act of 1859 or in any of the subsequent statutes with any provisions of Regulation XIII of 1830, which could stand in the way of hear-

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ing and determining special appeals under the Regulation in the same manner as special appeals under Act VIII of 1859 or as second appeals under Acts X of 1877, XIV of 1882 and V of 1908. A mere change in phraseology cannot make any difference in the result. Special appeals are practically the same as second appeals. I may add that I have not overlooked the change in the wording of section 1 of the present Code as compared with section 7 of Act XIV of 1882. But I am clear that it is only another way of expressing the same thing; the result is the same. I, therefore, overrule the preliminary objection, and hold that a special appeal lies to this Court, and that it lies only on the grounds mentioned in section 100 of Act V of 1908.

On the merits the appellant has no case. There is no error of law. The decision of the lower Court is based upon an appreciation of evidence, with which we cannot interfere in this special appeal. I, therefore, confirm the decree of the lower Court with costs.

HEATON, J.:—My consideration of this matter has led me to the same conclusion for substantially the same reasons.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt. Chief Justice, and Mr. Justice Batchelor.

1913. August 11.

THE BARODA SPINNING AND WEAVING COMPANY, LIMITED, APPELLANTS AND PLAINTIFFS, v. THE SATYANARAYEN MARINE AND FIRE INSURANCE COMPANY, LIMITED, RESPONDENTS AND DEFENDANTS.*

Contract Act (IX of 1872), section 28—Limitation Act (IX of 1908), section 3—Insurance—Agreement in restraint of legal proceedings—Modification of the law of limitation by agreement of the parties—Rights and remedies, distinction between—Conditional release or forfeiture not invalid.

The S. Insurance Co. granted a policy of insurance against fire to the B. Co., on certain property of the latter, the policy containing a clause to the effect that if

* Appeal No. 75 of 1912 ; Suit No. 673 of 1911.

a claim were made and rejected and an action or suit were not commenced within three months after such rejection all benefit under the policy should be forfeited.

Damage was caused to the property of the B Co. thus insured and a claim was made by that company of the S. Insurance Co which was rejected by the latter More than three months after such rejection the B Co filed a suit against the S. Insurance Co to recover the amount of their claim.

Held, that there is a distinction between the extinction of a right and the loss of a remedy, that section 28 of the Contract Act was aimed only at covenants not to sue at any time and at covenants not to sue for a limited time, that a conditional release or forfeiture was a very different thing from a covenant not to sue, although to avoid circuity of action a covenant not to sue had sometimes been held equivalent in effect to a conditional release, and that the condition of forfeiture in the policy in question in the suit was not within the scope of section 28 of the Contract Act.

The correctness of the decision in *Hirabhai* v. *Manufacturers Life Insurance Co* (1), doubted

Per Batchelor, J. —As I understand the matter, what the plaintiff was forbidden to do was to limit the time within which he was to enforce his rights; what he has done is to limit the time within which he is to have any rights to enforce, and that appears to me to be a very different thing

ON the 7th of February 1910 the defendant company issued to the plaintiffs a policy for Rs. 10,000 whereby they insured against loss or damage by fire to that extent the buildings, machinery, accessories, stock and stock in process of the plaintiff company's mills at Baroda. By condition XII of the policy of insurance it was *inter alia* provided :—

" ...or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection.......... ......all benefit under this policy shall be forfeited "

The plaintiff company had also insured their property with some 24 other insurance companies in Bombay in a sum in all of Rs. 9,38,000, remaining uninsured to the extent of Rs. 15,000, the total risk being placed at Rs. 9,63,000.

(1) (1912) 14 Bom L R 741

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Baroda Spinning & Weaving Company, Limited v. Satyanarayen Marine & Fire Insurance Company, Limited.

According to the plaint filed in this suit on the 11th of October 1910 at about 5-15 p. m. a fire broke out in the card room situated on the ground floor block No. of the plaintiff company's mill owing to friction in a countershaft driving slubbing frames, and the flames made their way through the wooden flooring into the spinning room above extending at the same time throughout the card room, and the spinning and card frame department and the reeling room with underground cellar were destroyed. Information of the fire was at once given by the plaintiff company to the insurance companies concerned, including the defendant company. The loss was surveyed on behalf of these insurance companies with the exception of the defendant company who declined to join in assessing the loss and was adjudged at Rs. 4,28,577 less Rs. 18,892 for salvage proceeds. The proportionate share of the defendant company in this loss amounted to Rs. 4,251-4-0 plus Rs. 43-9-6 as their share of the charges.

The plaintiff company called on the defendant company to pay these sums but the defendant company wrote on the 20th of April 1911 to the plaintiff company alleging that the non-compliance by the latter company with essential conditions of the policy made the latter null and void.

On the 14th of August 1911 the plaintiff company filed the present suit claiming from the defendant company payment of the abovementioned sum with interest and costs.

The defendant company filed a written statement denying liability on various grounds.

The case came on for hearing before Mr. Justice Beaman when *inter alia* the following issue was raised :—

6 Whether the plaintiffs' claim having been rejected by the defendant by letter of 20th April 1911, the plaintiff has not forfeited all benefits under the said policy by virtue of provisions of clause 12 of the conditions of the policy ?

On the application of counsel for the defendant company this issue was tried as a preliminary issue and on it the learned Judge gave the following judgment in favour of the defendant company.

BEAMAN, J.:—The preliminary issue I am asked to try arises upon clause 12 of the conditions of the policy upon which the plaintiffs are suing. Amongst other terms it is agreed between the parties under clause 12 that if, after a claim had been made and rejected, the insured should not institute any proceedings within three months from the date of such rejection he is to forfeit all benefits under the policy. It is conceded that this suit was not instituted within three months from the date of the rejection of the plaintiffs' claim, and I may observe that this is only one of the several technical defences upon which the claim is resisted.

The plaintiffs have been compelled to rely mainly upon section 28 of the Contract Act. It is contended that that section makes every agreement of the kind contained in clause 12 and now relied upon by the defendant company void. This contention, unfortunately for the plaintiffs, appears to me to be covered by authority which is binding upon me: *Hirabhai* v. *Manufacturers Life Insurance Co.*[1] The case there was much stronger because the words of the clause relied upon by the company undoubtedly on the face of them were restricted to limitation. The agreement was that no suit should be brought upon the policy after the expiration of one year after the cause of action accrued. But the learned Judges of the Appeal Court apparently found no difficulty in coming to the conclusion that such an agreement was not within the scope or intention of section 28 of the Contract Act and neither conflicted with it in principle nor in language.

[1] (1912) 14 Bom. L. R. 741

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The reason of the decision, which is of a broadly general character, appears to be: first, that clauses of this kind in policies of insurance need not be interpreted literally but with special reference "to the object and exigencies of insurance"; secondly, that although in form agreements of this kind appear to limit the period within which suits can be brought to enforce rights under the policy, they in substance amount to a waiver of the rights of the insured subject to the condition, and, therefore, go much further than merely barring the remedy. The decision, therefore, appears to me to be of a general character and to support the defendants' contention here that the particular clause upon which he relies is not void by reason of anything contained in section 28 of the Contract Act. The language of the clause in this case is far more favourable to the defendants having regard to the reasoning which seems to have commended itself to the learned Judges in the case of *Hirabhai* v. *Manufacturers Life Insurance Co.*[1], for here the insured agrees that on failure to institute proceedings within three months of the rejection of his claim he will forfeit all the benefits to which he might otherwise be entitled under the policy and the use of such language might give some colour to the distinction upon which the learned Judges rely for taking all contracts of this kind out of the scope and intention of section 28. It is not for me to state critically all the reasons that might be adduced against the conclusion, which I feel to be binding upon me. It is enough for me to say that after having given the reasoning of the learned Judges in that case my fullest and most careful attention I am still of opinion, with the greatest deference, that there is room for very grave doubt whether the case was rightly decided; for there can, I think, be no doubt at all but that it does

[1] (1912) 14 Bom. L R 741.

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decide the contention upon which the plaintiffs here mainly rely, and as it is a decision of this Court it is binding upon me. I must, therefore, hold, however reluctantly, that the condition in clause 12 is not void under section 28 of the Contract Act.

The only other ground upon which the plaintiffs were able to argue that the case ought not to be defeated under that clause was that on the face of it it is a forfeiture clause and that the time specified ought not to be regarded as of the essence of the contract. I am unable to accede to that argument. Rightly or wrongly clauses of this kind are usually inserted in policies of insurance for a reason which widely commends itself to the business interests directly involved, *viz.*, that all claims of these kinds ought to be made at the earliest possible date and in any case while they are still fresh. If then contracts of the kind are permissible at all, notwithstanding section 28 of the Contract Act, it would appear that their only value could lie in their being literally enforcible. If the insurer and the insured notwithstanding Article 86 of the First Schedule to the Limitation Act and section 28 of the Contract Act may agree that the insured is only to sue within three months of the final rejection of his claim by the insurer, then it appears to me idle to say that the Courts may give the go-bye to the period so fixed and substitute for it any other period which they may deem reasonable. The law must in all cases be presumed, at any rate in Courts of law, to be reasonable. So that it would amount to this, that the period prescribed by the law of limitation would always be a reasonable period and once the actual terms of the limiting agreement were overstepped it would be impossible to make any distinction between the relations of the parties under such an agreement and under the general law of limitation. Lastly, I am to observe upon this defence that the plaintiffs have not

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the same ways to meet it which they intended to use against the other technical defences set up against them. Whatever may have been the conduct of the agents and representatives of the defendant company and however that conduct may have affected their defence under clause 10 of the conditions, it is conceded that for the purposes of this argument no evidence of conduct would be relevant to or could possibly affect the decision; for on the 20th of April the defendant company, whether honourably or dishonourably, did flatly reject the plaintiffs' claim and thereafter it was for the plaintiffs to comply with the condition set forth in clause 12. I have come to this conclusion with the utmost reluctance because, after having heard the case opened and considered the principal defences set up by the defendant company, it was impossible to doubt in reference to those defences that the attitude and conduct of this defendant company from first to last have been most dishonest and unfair to the plaintiffs, and speaking for myself nothing would give me greater pleasure than if the Appeal Court, should this question be taken there, were to hold that the decision I have come to upon this preliminary issue is wrong and so re-open the case for further trial upon its merits. In case, however, it should stop here I have only to add that I am sure that were all the pleadings and the opening statements and arguments of counsel fully communicated to the public, the public would be very reluctant to have further dealings with this Swadeshi Company.

Having regard to the fact that I am now about to dismiss the suit not in accordance with my own conviction but merely because I feel myself bound by the decision of a superior Court, and having regard to the very strong opinion I have just expressed, an opinion formed I admit only upon the material so far laid before me, I shall, in dismissing the suit of the plaintiffs

upon this preliminary issue, leave each party to bear their own costs.

The plaintiffs appealed.

Strangman (Advocate General) with *Kanga*, for the plaintiff appellants.

Bahadurji with *Desai*, for the defendant respondents.

Refers to Bunyon on Fire Insurance, page 86 et seq., condition X at page 107.

The fire took place on the 11th of October 1910, the claim was made on the 18th of February 1911, the claim was rejected on the 20th of April 1911 and the plaint was filed on the 14th of August 1911.

As to costs, refers to *Civil Service Co-operative Society* v. *General Steam Navigation Company*[1]; *Cooper* v. *Whittingham*[2]; *Edmund* v. *Martell*[3]; *Granville and Co.* v. *Firth*[4]; *Elms* v. *Hedges*[5]; technical defence is no ground for depriving a party of his costs.

At Common Law lapse of time does not affect contractual rights. Such rights are of a permanent and indestructible character unless either from the nature of the contract or from its terms it be limited in point of duration: see Anson, page 326.

Public policy means policy of the law. Modern decisions while maintaining the duty of the Court to consider public advantage have tended to limit the sphere within which this duty has been exercised. The modern view of the subject is expressed by Jessel, M. R., in *Printing and Numerical Registering Company* v. *Sampson*[6] .—

"You have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract". see Anson, page 202.

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(1) [1903] 2 K B 756.
(2) (1880) 15 Ch D. 501.
(3) (1907) 24 T. L. Rep 25.
(4) (1903) 19 T. L. Rep. 213.
(5) (1906) 95 L. T. 145.
(6) (1875) L. R. 19 Eq 462 at p 465.

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The agreement is that the rights under the agreement shall cease to exist if a claim is rejected and no suit is filed thereafter within three months: if then the rights under the contract are extinguished the plaintiff has no cause of action.

C. A. V.

SCOTT, C. J.:—One of the conditions in the policy of fire insurance sued on by the plaintiffs is that "if the claim be made and rejected and an action or suit be not commenced within three months after such rejection all benefit under this policy shall be forfeited."

The claim on the defendants was rejected on the 20th of April 1911, but the suit was not commenced till the 14th of August 1911. Upon this ground the suit was dismissed in the lower Court. That such a condition is not unreasonable or opposed to public policy is conceded by the appellants' counsel and can hardly be disputed in view of the remarks of the Judicial Committee in *Home Insurance Company of New York v. Victoria-Montreal Fire Insurance Company*[1]. But it is argued that the condition is void as an agreement of the nature described in section 28 of the Contract Act since it limits the time within which a party to the contract may enforce his rights under the contract by the usual legal proceedings. The section contemplates the suspension permanently or temporarily of the usual remedies for the enforcement of legal rights. It aims at the prohibition of agreements which could only operate so long as rights were in existence. The argument of the appellants' counsel was that the forfeiture clause was equivalent to an agreement that no Court should entertain any suit on the policy unless commenced within three months of the rejection of the claim. The steps in his argument were: section 3 of the Limitation Act indicates that the law of limitation cannot be modified by agree-

(1) [1907] A. C. 59.

ment of parties as it can in England; that there is no distinction under that Act between rights and remedies; and that a conditional agreement to forfeit rights within the period within which the remedy is not barred by the Limitation Law is a void agreement.

I cannot accept the proposition that there is no distinction in India between rights and remedies. Section 28 of the Limitation Act shows the cases in which the loss of the remedy will destroy the right but that does not cover suits for money such as we are now concerned with. On the other hand the loss of the right always involves the disappearance of the remedy—a very material consideration in the case of a conditional forfeiture of all benefit under a policy.

In my opinion section 28 of the Contract Act is aimed only at covenants not to sue at any time and covenants not to sue for a limited time, which had given rise to difficulty in England: see the judgment of the Exchequer Chamber in *Ford* v. *Beech*[1]; *Beech* v. *Ford*[2]; *Gibbons* v. *Vouillon*[3]; *Newington* v. *Levy*[4]; and the judgments in *Slater* v. *Jones*[5]. A conditional release or forfeiture was a very different thing from a covenant not to sue, although in order to avoid circuity of action a covenant not to sue was sometimes held to be equivalent in effect to a conditional release. For this reason I share the doubt of Beaman, J, as to the correctness of the decision in *Hirabhai* v. *Manufacturers Life Insurance Co.*[6], where the agreement was that—"No suit shall be brought against the Company in connection with the said policy later than one year after the time when the cause of action accrues." As however the condition of forfeiture which we have to deal with here is not in my opinion within the scope of section 28, I would affirm

(1) (1848) 11 Q B 852 at p 871
(2) (1848) 7 Hare 208
(3) (1849) 8 C. B 483
(4) (1870) L. R. 6 C. P. 180 at p 191.
(5) (1873) L. R. 8 Ex. 186.
(6) (1912) 14 Bom L. R. 741.

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the decree, and with costs, for the reasons given by the learned Judge for disallowing costs to the successful defendants do not appear to me adequate.

BATCHELOR, J.:—This suit was brought by the plaintiff company to recover from the defendant company a sum of Rs. 4,297-13-6 as the amount payable by the defendants under a policy of insurance issued by them to the plaintiffs. Numerous defences were raised, but the suit was dismissed by Beaman, J., upon a preliminary issue. That issue arose upon clause 12 of the conditions of the policy, which provided, *inter alia*, that "if the claim be made and rejected, and an action or suit be not commenced within three months after such rejection, all benefit under this policy shall be forfeited". The facts admittedly are that the plaintiff company's claim was made and rejected by the defendants, and that this suit was not commenced until after the expiry of three months after such rejection. The suit was, however, instituted within the period allowed by the law of limitation; consequently, so far as regards the preliminary issue, the suit is free from objection unless the defendants can successfully rely, as they seek to rely, upon the special terms of clause 12 of the conditions. For the plaintiffs it was contended that the provisions of this clause, as cited above, could not be pleaded in bar of the suit because those provisions constituted a void agreement under section 28 of the Contract Act. The learned Judge below, though with expressed reluctance, accepted the argument for the defendants holding himself bound to do so by the decision of the Bench in *Hirabhai* v. *Manufacturers Life Insurance Co.*[1] He accordingly made a decree dismissing the suit, and from that decree the present appeal is brought.

The point involved, though in itself a short one, and not, I think, susceptible of much useful elaboration,

[1] (1912) 14 Bom. L R. 741.

cannot be said to be free from difficulty. We have to make our election between two rival arguments, each of which may be said to possess at least plausibility. As a member of the Bench by which *Hirabhai's case* was decided, I wish shortly to explain the effect produced on my own mind by the somewhat more thorough argument of which we have had the advantage in this appeal, and by the further consideration which I have been able to give to the question.

Section 28 of the Contract Act provides as follows :—

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extent"

The phrase "thus enforce his rights" refers, I understand, to the enforcement "by the usual legal proceedings in the ordinary tribunals"

The question is whether the agreement in clause 12 of the conditions is void under this section. As I understood the argument for the appellants, the learned Advocate General, while admitting—what has often been decided—that the Indian Limitation Act operates in such a case as this not to extinguish rights, but only to bar remedies, contended that for the purposes of this appeal we should look rather to the substantial effect intended by the section than to the precise form of words which the Legislature has used. The argument was that, however valid and important in law be the distinction between the barring of a remedy and the extinguishment of a right, yet to the man of business it is much the same thing whether his right be gone or the remedy for enforcing that right be barred, and it was urged that in substance and effect there was no appreciable distinction between saying 'I agree that upon the expiry of three months after the rejection of my claim, my rights shall be forfeited,' as is said here, and saying 'as to the time

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within which I may enforce my rights, I agree to limit it to the period of three months, after the rejection of my claim'; and this latter covenant would undoubtedly be void under the section. In my opinion, however, the distinction, which beyond question exists, is vital in the construction of the section. As I understand the matter, what the plaintiff was forbidden to do was to limit the time within which he was to enforce his rights; what he has done is to limit the time within which he is to have any rights to enforce; and that appears to me to be a very different thing. This seems to have been the view which was tacitly accepted by the Calcutta High Court in the *South British Fire and Marine Insurance Co.* v. *Brojo Nath Shaha*[1] though it must be admitted that that decision is of no direct assistance, since the question of the effect of section 28 of the Contract Act on such agreements was not expressly considered.

It was conceded in argument that in England the agreement in clause 12 would be perfectly valid; and it cannot, I think, be contended that Insurance Companies in India have less need than such companies in England of the protection afforded by an agreement for the acceleration of legal proceedings to be brought against them. That being so, there is the less reason to suppose that the Legislature intended section 28 to have the far-reaching effect for which the plaintiffs contend. I am aware that, under the authority of the *Bank of England* v. *Vagliano Brothers*[2], we must be very cautious how we have recourse to the pre-existing state of the law for the purpose of interpreting section 28 of the Contract Act; but in deprecating any general practice of that sort Lord Herschell added that "if a provision be of doubtful import, such resort would be perfectly

(1) (1909) 36 Cal 516

(2) [1891] A. C. 107.

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legitimate." I infer, therefore, that in this case it is permissible to glance at what was the state of the law in England prior to 1872 when the Indian Legislature undertook the codification of the law of contract. Reference to the authorities will, I think, disclose that there was much complexity in the law as to the validity of a covenant not to sue: see Baron Parke's judgment in *Ford* v. *Beech*[1]. It was there held that a covenant not to sue at any time, though not in terms releasing the debtor, yet operated as a release upon the principle of avoiding circuity of action. But a covenant not to sue for a limited time operated only as a covenant, and could not be pleaded as a release: *Thimbleby* v. *Barron*[2]; while a covenant not to sue for a limited time, with a condition suspending the right of action during that time, was construed as a conditional release and could be pleaded in bar of a suit brought within the time: *Walker* v. *Nevill*[3]. There were also, as the decisions show, other incidental matters of much difficulty in this branch of the law, and I am inclined to think that the genesis of section 28 is to be found in the Indian Legislature's desire to sweep away the refinements of the then English law and to enact for India a simpler and more suitable rule. The two prohibitions in the section certainly seem to follow the distinction made in the English cases, and, if that is so, the prohibition of the limitation of time within which a party may enforce his rights follows the English doctrine that a covenant not to sue for a limited time does not amount to a release. And if section 28 be read as a whole, and compared with the effect of such decisions as I have noticed, it seems a probable inference that the Indian Legislature considered it would be simpler, and therefore more convenient, to brush away the somewhat fine

(1) (1848) 11 Q B. 871 (2) (1838) 3 M & W. 210
(3) (1864) 3 H & C 403

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distinctions of the English law by laying down the broad general rule that all agreements should be void which either absolutely restrict a contracting party's right to resort to the Courts or merely limit the time within which the rights should be enforced; in that case the phrase as to limiting the time would necessarily bear the same meaning which it has in the English Court's judgments, the meaning namely, that it is not open to a party to covenant that, while his rights subsist, he will diminish the period within which he *shall be at liberty to sue. These considerations*, therefore, appear to me to afford an additional reason for the conclusion that the language of section 28 has been carefully chosen so as to convey the narrower meaning to which alone the words are apt and appropriate.

For these reasons I agree that the decree under appeal should be affirmed. I concur also in the order as to costs, as I do not find sufficient materials on the record to justify the order depriving the successful defendants of their costs.

It remains only to add a word as to *Hirabhai* v. *Manufacturers Life Insurance Co.*[1] It appears to me that the case was rightly decided on the view which Chandavarkar, J., and I took of the meaning of the agreement; but I recognize that there are difficulties in the way of holding that the words of the agreement there were properly susceptible of that meaning.

Attorneys for the plaintiffs: *Messrs. Bhaishankar, Kanga and Girdharlal.*

Attorneys for the defendants: *Messrs. Hiralal & Co.*

Decree confirmed.

H. S. C.

[1] (1912) 14 Bom L. R. 741.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr Justice Batchelor.

B. N. LANG, APPELLANT AND DEFENDANT, *v.* HEPTULLABHAI ISMAILJI, RESPONDENT AND PLAINTIFF.* — 1913 *August 19*

Presidency Towns Insolvency Act (III of 1909), section 17—Leave of Court—Power of secured creditor of adjudicated insolvent to realise his security by means of a regular suit without obtaining leave.

A, having obtained a decree in a suit brought by him against B for the payment of a sum of money, assigned the decree to C by way of mortgage to secure the repayment of monies advanced by C to A. Subsequently A became insolvent and his property being vested in the Official Assignee the latter executed the decree against B and obtained payment of the amount due from B in full. Subsequently C, without the leave of the Court first obtained, brought a suit against the Official Assignee to recover the amount due to him as mortgagee of the decree against B out of the monies so recovered by the Official Assignee.

Held, that the Official Assignee, having executed a decree which had been assigned by way of security, was in the position of a mortgagor who had sold the mortgaged property and was in possession of the sale proceeds, that until the claim of the mortgagee had been satisfied the insolvent or his Official Assignee had no right to the proceeds of the decree and that the secured creditor in such a case might file a suit to obtain payment of his claim out of the amount so recovered by the Official Assignee without obtaining the leave of the Court under section 17 of the Presidency Towns Insolvency Act as the proviso to section 17 covered a suit by a mortgagee to realise his security.

ONE Tyabhai Moosaji filed a suit, namely Suit No. 1053 of 1909, and obtained a decree for the payment of Rs. 2,410-1-5 with interest at 6 per cent. per annum against one Abdoolabhai Farzoolabhai. On the 1st of June 1910, the plaintiff in this suit, at the request of Tyabhai Moosaji, advanced to the latter the sum of Rs. 2,000 at the interest of 9 per cent. per annum on the security of the decree in the abovementioned suit (exclusive of the right to costs under the decree) and

* Appeal No. 1 of 1913. Suit No. 603 of 1912.

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subject as aforesaid the decree was, by a deed of assignment dated the 9th of June 1910, assigned to the plaintiff who thereon served the judgment debtor with notice of the assignment, which notice however the latter declined to receive.

Subsequently Tyabhai Moosaji became insolvent and his estate accordingly became vested in the Official Assignee, who executed the decree in Suit No. 1053 of 1909 against Abdoolabhai Farzoolabhai and recovered the full amount due on the decree from the latter. The Official Assignee refused to recognise the plaintiff's claims under the deed of assignment of the 9th of June 1910.

The plaintiff filed a suit against the defendant as Acting Official Assignee and assignee of the estate and effects of Tyabhai Moosaji claiming a declaration that he was entitled to be paid out of the estate of Tyabhai Moosaji by the defendant the sum of Rs. 2,000 and the interest due thereon and that he was a secured creditor for that amount and was entitled to be paid out of the judgment debt recovered by the Official Assignee the abovementioned sums, the costs of the present suit and other costs incurred by the plaintiff.

The suit was tried before Mr. Justice Beaman. At the trial the following issue amongst others was raised :—

(1) Whether this suit is maintainable under section 17 of the Insolvent Act ?

The learned Judge gave judgment on the 3rd of December 1912 in favour of the plaintiff holding on the abovementioned issue as follows :—

BEAMAN, J. :—This is a suit by the plaintiff against the Official Assignee to recover a sum of Rs. 2,000 secured by the mortgage of a decretal debt by an instrument dated the 9th of June 1910. The defendant replies that

the suit is barred by section 17 of the present Presidency Towns Insolvency Act, as no leave has been obtained. In support of that contention I am referred to a recent judgment delivered by my brother Davar, J., in which he takes that view. It appears that shortly afterwards upon a motion before Heaton, J., this judgment was cited and that learned Judge, without expressing any opinion of his own, thought it right to follow it. It can only be with the greatest reluctance and the utmost deference to the opinion of my brother Davar, J., that I do not adopt the same view, but I feel unable to accept the conclusion reached by Davar, J. After giving his judgment my best attention, I am sensible that there is much to be said for the view he takes and that he has said it as well and as forcibly as possible, yet it appears to me that before that conclusion can be established the language of section 17 with its proviso needs so much interpretation even going the length of inserting words, which are not to be found in the section or the proviso itself, that I should hesitate long before departing from the plain and only meaning of the language used by the Legislature. The concluding words of the proviso seem to me to be conclusive; for if there were no such section as section 17 how could it be said that a secured creditor might not realise his security in the ordinary way by means of a suit? In some cases it is not easy to say how he could do so by any other means. Take for example the case of an equitable mortgage. Having read the proviso with the section very carefully and duly considered all the reasoning contained in the judgment of my learned brother Davar, J., it still seems to me that section 17, which is taken verbatim from section 9 of the English Bankruptcy Act of 1883, does and is intended to save all the rights of secured creditors as they existed and were enforceable before the passing of that Act.

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The defendant appealed against the judgment and decree of the learned Judge.

Kanga, with *Taraporevala*, for the defendant-appellant.

The principal questions are—

(1) Was Rs. 2,000 paid on the 1st of June 1910?

(2) No leave having been obtained is the suit not maintainable in view of section 17 of the Presidency Towns Insolvency Act?

The proviso to section 17 only refers to realisation outside the Court. If a suit has to be filed the mortgagee must obtain the leave of the Court. Power of a secured creditor does not mean a right to sue.

The Transfer of Property Act (IV of 1882), sections 67 and 68, speak of a mortgagee's right to sue, not power to sue. (Refers to proviso as to powers in sections 6 to 9 of the Trustees and Mortgagees Powers Act, XXVIII of 1866.) The Civil Procedure Code speaks of right to sue, not power to sue. Even the Official Assignee must have leave to sue before filing a suit.

Under section 18 ot the Act the Court could order a stay even in a foreclosure suit.

Courses open to a secured creditor, Rule 3, 2nd Schedule and section 86 of the Act.

Refers to sections 12 and 72 of the Bankruptcy Act (32 and 33 Vict c. 71): *White* v. *Simmons*[1]; *Lloyd* v. *David Lloyd & Co.*[2]; *Waddell* v. *Toleman*[3].

Strangman (Advocate General), with *Desai*, for the plaintiff-respondent.

Kanga replies.

SCOTT, C. J.:—Two questions have been argued in this appeal, first, whether the plaintiff was the assignee

[1] (1871) L. R. 6 Ch. 555.
[2] (1877) 6 Ch. D. 339.
[3] (1878) 9 Ch. D. 212.

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by way of mortgage of the insolvent's decree, and, secondly, whether this suit, instituted without the leave of the Court, is barred as falling under the general prohibition of suits without such leave contained in section 17 of the Presidency Towns Insolvency Act or whether it is saved by the proviso that the section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

On the first question there can be no doubt that the decision must be in the affirmative for the evidence is all one way and establishes the claim.

The Official Assignee, having executed a decree which had been assigned to the plaintiff by way of security, is in the position of a mortgagor who has sold the mortgaged property and is in possession of the sale proceeds. Until the claim of the mortgagee is satisfied, the insolvent or his Official Assignee has no right to the proceeds of the decree. It is argued that the saving proviso to section 17 does not cover the present suit because the power of a secured creditor to realise his security does not include a suit for enforcement of his rights. We are unable to accept this view. A suit is one of the recognised methods of realisation of mortgage securities. The expression 'realise his security' is quite an appropriate and well-recognised term to include all the remedies of the mortgagee. The following are examples of its use in practice in relation to mortgagees suits.

In *Lloyd* v. *David Lloyd & Co*[1] Jessel M. R. says: "Now, as a rule, a mortgagee has a right to realise his security, and of course, as incidental to that, a right to bring an action for foreclosure."

[1] (1877) 6 Ch D 339 at p. 343.

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In Yate Lee on Bankruptcy Act of 1883 (3rd Edn.), under G. R. 73 (page 627) the following note occurs:—"In 1852 by 15 and 16 Vict. c. 86, section 18, the court of chancery was, for the first time, authorised to direct the sale of a mortgaged property, instead of a foreclosure of the equity of redemption; and, from that time, applications by a mortgagee for realisation of a security given by a mortgagor who became bankrupt, were usually made in chancery, the reason being that in chancery the mortgagee, as plaintiff, usually had the conduct of the sale, whereas under the rules the trustee of the mortgagor had the conduct unless otherwise ordered, and that under the rules the trustee's costs were made a charge on the property, and might have priority over the mortgage, contrary to the practice in chancery which postponed them to the mortgagee's claim. This is still the case under the present rules; and a mortgagee can, therefore, generally realise his security to greater advantage, by applying to the chancery division, than by applying in bankruptcy."

Lastly, we may refer to a rule in *pari materia*, *viz.*, Rule 14 (3) of the Companies Winding-up Rules, 1892, "Provided always that nothing in this Rule or in Order XLIX, rule 5, of the Rules of the Supreme Court, 1883, shall authorise the transfer of any action by a mortgagee or debenture holder for the purpose of realising his security."

The necessity for these illustrations arises from the fact that in Suit No. 47 of 1912, *Lalchand* v. *Balkrishna*,*

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* NOTE.—In *Lalchand* v. *Balkrishna*, the following judgment was delivered by Davar, J., on the 15th of October 1912.—

DAVAR, J.:—The plaintiffs in this suit claim to recover from the first defendant a sum of Rs. 4,500 and interest thereon, alleging that this sum is due to them under an indenture of mortgage, dated the 14th of February 1910, and executed by the first defendant whereby he mortgaged to them his one-third share in certain properties belonging to himself jointly with the other members

Davar, J., held that the words "power to realise" in the proviso to section 17 only had reference to the powers

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of his family. The first defendant had, on the 3rd of October 1910, presented his petition in insolvency and that petition was pending on the 9th of January 1912, when this suit was filed. In consequence of the first defendant's pending insolvency, the plaintiffs made the Official Assignee a co-defendant in the suit and they have also joined the father, brother and sister of the first defendant, alleging that they are interested in the property mortgaged to the plaintiffs, as members of a joint and undivided Hindu family. They pray for a money-decree against his (sic) mortgagee or the Official Assignee and further pray that in default of payment the mortgaged premises may be ordered to be sold and that, in so far as it may be necessary, the property comprised in the deed of mortgage be ordered to be partitioned and the first defendant's share therein ascertained and ordered to be made available for the satisfaction of their claim.

The first defendant disputes the mortgage but for our present purposes it is necessary to refer to his contentions. He pleads however at the outset that the suit is not maintainable having regard to the provisions of the Presidency Towns Insolvency Act. The third defendant raises the same objection to the suit and further pleads that the plaint discloses no cause of action against him and that he is not a necessary party.

Amongst the issues raised at the hearing were (1) Whether this suit is maintainable having regard to the provisions of section 17 of the Presidency Towns Insolvency Act of 1909, and (4) Whether the suit as framed is maintainable against defendants 3, 4, 5 and 6.

By an order made on the 3rd of July 1912, it was ordered that the petition in insolvency filed by the first defendant and dated the 3rd of October 1910, be dismissed and it was further ordered that the order of adjudication made thereon, on the 4th of October 1910, be annulled. Under these circumstances the plaintiffs asked that the second defendant's name be struck off and an order to that effect was made accordingly.

Having regard to the contentions raised in the first and fourth issues, I directed that they should be first argued before me and that the trial of the other issues should stand over till I had dealt with these issues which if decided against the plaintiffs, would terminate the suit either wholly or in part.

The contentions of the defendants raised in the first issue are based on section 17 of the Presidency Towns Insolvency Act being Act III of 1909. That section provides that "on the making of an order of adjudication, the property of the insolvent   shall vest in the Official Assignee and

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of mortgagees or pledgees to sell the property mortgaged or hypothecated to them without recourse to a suit. In

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. . . no creditor shall during the pendency of the insolvency proceedings . . commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose." To this section is attached a proviso which enacts that the "section shall not affect the *power* of any secured creditor *to realise* or otherwise *deal with* his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed" It is conceded that if the section had stood by itself without the proviso, this suit, not having been filed with the leave of the Court, would fail But it is contended that the proviso permits a secured creditor to file a suit of the nature of the suit now before me.

I am unable to accept this contention. It is quite clear from the language of the proviso and the words employed therein, that it is not intended to be an exception to the rule laid down in the section and to apply to *suits* by secured creditors. The proviso does not in any way qualify the bar against a creditor filing a suit without the leave of the Court. What the proviso enacts is that the power of a secured creditor to realise or otherwise deal with his security by means other than a suit shall remain unaffected by the insolvency of the debtor If it was intended by the Legislature to make an exception in the case of suits by secured creditors, they would in the section itself have added the words "except a secured creditor" after the words "no creditor". Instead of making any such exception the Act merely provides that the *power* of a secured creditor to realise or deal with his security shall not be affected by the provisions of this section If a suit for realising a creditor's security was intended to be covered by this proviso, the word "power" would never have been used, but the language would have been "the right to sue to realise a security". Again the words "otherwise deal with" in conjunction with the words "realise" make it abundantly clear that the proviso has reference to certain well-recognised powers which a secured creditor possesses. In my opinion the proviso refers to such powers as mortgagees and pledgees may have of selling the property mortgaged to or hypothecated with them without recourse to a suit and the words "deal with his security" refer to the rights they may have of transferring or assigning the debt due to and the security in the possession or at the disposal of the said creditors The Act having come into operation not very long, there is no Indian authority on the subject; but the section corresponds with section 9 of the English Bankruptcy Act of 1883, and in spite of Mr. Rangnekar's most industrious efforts on behalf of his clients, he has not been able to cite a single authority, showing that after that Act came into force, secured creditors in England were permitted to sue an insolvent debtor or the Official

White v. *Simmons*[1], in dealing with a proviso in the same words as that now under discussion, Lord

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Receiver to realise their security without the leave of the Court. Certain cases were cited before me, but they were cases all decided before the Bankruptcy Act of 1883 came into operation, and were under an Act which did not contain any corresponding provisions as are to be found in section 9 of the Bankruptcy Act of 1883. And one or two others after 1883 had no application to the question now before me.

Under these circumstances, I must hold that this suit, having been filed without the leave of the Court previously obtained, is not maintainable. Mr. Rangnekar asks me to remedy the defect by giving him leave now But it seems to me that I have no power to do so, as the leave contemplated under section 17 of the Insolvency Act is leave that must be obtained previous to the institution of the suit

Having come to these conclusions, it is unnecessary to discuss the question raised in the fourth issue But I feel that in view of the fact that the plaintiffs will have to file another suit, unless my present finding is found to be erroneous I ought to say that I feel disposed to regard the frame of the present suit as bad As the suit fails on the first issue, I have not considered the authorities that have been cited before me, and what I now state ought in no sense to be taken as my judgment I merely say, for the guidance of those who may have to frame another suit, that it seems to me that in a suit by a creditor to establish his mortgage against the share of his mortgagor in the property of a joint Hindu family, the other members of the family are not necessary parties and before he has established his mortgage and executed his decree and purchased his mortgagor's share he cannot ask for partition in the same suit in which he wishes to establish his claim under his mortgage Not only in a suit, such as I have before me, have the plaintiffs no cause of action against the other members of the family, but the plaintiffs appear to me to misjoin both parties and causes of action in the suit, and in any event even if I had come to the conclusion that the frame of the suit was not bad I would have still been inclined to exercise the powers that are vested in the Court under Order II Rule 6, of the Civil Procedure Code

I find the first issue in the negative and for the defendants I dismiss the suit Plaintiffs will pay the defendants' costs of this suit

After I had written out the judgment and just as I was going to deliver it Mr Rangnekar asked my permission to draw attention to a case he had come across after the matter was argued before me. I read the case and found that

(1) (1871) L R 6 Ch 555

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Hatherley declined to hold that where there was "an express reservation of all rights, a mortgagee should be precluded from proceeding in equity to enforce his security".

In our opinion the learned Judge in the present case was right in holding that the proviso to section 17 covers this suit as a suit by a mortgagee to realise his security.

The appeal must be dismissed with costs.

Attorneys for the appellant: *Messrs. Bicknell, Merwanji, Romer & Co.*

Attorneys for the respondent: *Messrs. Surajmal & Co.*

Appeal dismissed.

H. S. C.

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it had no application to the question I had before me and would make no difference in my decision. The case is that of *Sharp* v. *McHenry*(1). The Court there was not considering whether a secured creditor can institute legal proceedings and maintain an action without the leave of the Court. The question before the Court was whether two pending actions should be stayed under section 10, sub-section (2) of the Bankruptcy Act of 1883. The substantial action by the creditor was filed before the debtors' bankruptcy and another action was filed by the creditor against the Official Receiver which seems to have been subsidiary to the first suit. The first action required no leave, having been filed before bankruptcy. It does not appear if the second action was with or without the leave of the Court.

The question in the case was not whether the actions were maintainable in the absence of leave contemplated by section 9 of the Bankruptcy Act of 1883 but it was merely whether under the discretion vested in the Court under section 10, sub-section (2), and having regard to the rival jurisdiction of the Chancery and Bankruptcy Sides of the High Court in matters relating to the estate of a bankrupt, the Court should not stay proceedings in the Chancery Division of the High Court. Under the peculiar or rather complicated circumstances of that case the Court refused to stay proceedings.

I do not think this case has any applicability to the present suit before me.

(1) (1886) 55 L. T. 747

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Macleod.

LAXMAN GANESH RAJENDRA (ORIGINAL PLAINTIFF), APPELLANT, *v.* MATHURABAI NARAYAN GOVIND (ORIGINAL DEFENDANT), RESPONDENT.* 1913. *September* 23

Transfer of Property Act (IV of 1882), section 101—Extinguishment of charge—Mortgagee having two charges—Purchase by mortgagee at the sale under the first mortgage—Second mortgage cannot be enforced

G took a mortgage of certain lands in 1886 They were mortgaged to him again in 1894 In 1895, he sued on his first mortgage and obtained a decree In execution of the decree the lands were sold subject to the mortgage of 1895 and purchased by G with the permission of the Court. In 1905, a partition took place between G's heirs, at which the certificate of sale went to the share of the defendant and the mortgage-deed of 1895 went to the share of the plaintiff. The plaintiff next sued the defendant to enforce the mortgage against her —

Held, that the plaintiff could not sue the defendant on the mortgage, for after what had occurred in 1895 G could have had no right to sue himself in a double capacity as mortgagee under the mortgage of 1894 and mortgagor under the sale-certificate of 1895, that is he could have had no cause of action against himself, and the plaintiff as his heir could have no higher rights

SECOND appeal from the decision of C. E. Palmer, District Judge of Nasik, confirming the decree passed by Gulabdas Laldas, First Class Subordinate Judge at Nasik.

Suit on mortgage.

The lands in dispute were mortgaged by Mahadu to Govind on the 26th April 1886. They were again mortgaged by Mahadu to Govind in May 1894, for a period ending with 22nd June 1895.

On the 11th February 1895, Govind sued on his mortgage of 1886 and obtained a decree for sale. The lands were sold in execution of the decree, subject to the mortgage of 1894 and were purchased by Govind himself with the permission of the Court. The usual certificate of sale was issued to him in due course.

* Second Appeal No 531 of 1912.

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On Govind's death, a partition took place between his grandson (the plaintiff) and the defendant, who was the widow of Govind's son Narayan who survived his father by a few months. At this partition the sale-certificate went to the share of the defendant, whilst the deed of mortgage dated 1894 went to the plaintiff's share. The defendant took possession of the lands.

In 1910, the plaintiff sued the defendant on the mortgage of 1894.

The lower Courts dismissed the suit on the ground that by reason of the purchase at the Court-sale the mortgage of 1894 had ceased to exist and all the rights had merged in Govind.

The plaintiff appealed to the High Court.

Gadgil, with *K. H. Kelkar*, for the appellant.

D. R. Patvardhan, for the respondent.

BEAMAN, J. :—The property in suit was first mortgaged by its owner to Govind and his two brothers in the year 1886. In 1894 the land was again mortgaged to Govind for Rs. 2,500. In the meantime it would appear that Govind's two brothers must have died because in 1895 Govind brought a suit upon the mortgage of 1886 and obtained a decree. The mortgage amount claimed was Rs. 2,000. Govind obtained permission to bid at the sale of the property, and also applied to the Court that that sale should be made subject to his own second mortgage of 1894. It appears that this application was at first rejected, but the sale-certificate shows that the property was sold subject to Govind's second mortgage of Rs. 2,500, and was purchased by Govind himself for Rs. 1,791. Govind is the grandfather of the present minor plaintiff. Govind appears to have had two sons, Ganesh, the father of the plaintiff, and Narayan, whose widow is the defendant in this suit. Ganesh predeceased Govind. The defendant's husband survived Govind by a short

time, both dying in the year 1904. Therefore, the family appears to have consisted before the death of Govind, of Govind, his son Narayan, and his grandson, the plaintiff. On the death of Govind the family consisted of Narayan and the plaintiff, and on the death of Narayan the ordinary result would have been that all the joint family property would have come into the sole and exclusive ownership of the minor plaintiff. But in 1905 it appears that a partition was sanctioned by the District Court of Nasik between the minor plaintiff and his aunt, the defendant, the latter taking in the proportion of 6/16ths. Speaking for myself I must record my surprise that any arrangement of that sort should have been come to and sanctioned by the District Court, since on the facts, which have been stated on appeal, it appears to me perfectly clear that the minor was entitled to the whole of the joint family property, whatever it may have been, and the defendant merely to maintenance.

Reverting to what happened in 1895, when Govind redeemed the first mortgage of 1886, it would appear that as a result of that sale and his purchase, the property, which was the subject-matter of that mortgage and his own subsequent mortgage of 1894, became his exclusive property, or that of the joint family of which he was a member.

It has been contended on behalf of the plaintiff that having regard to the terms of the sale-certificate, we are bound to hold that Govind kept alive the charge represented by his second mortgage of Rs. 2,500 upon this property in his own interest within the language and intention of section 101 of the Transfer of Property Act.

Now, when the partition of 1905 was effected a very curious procedure was adopted, as apparently the officer

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entrusted with making lots put up all the documents, which had the appearance of being valuable securities, in sixteen packets, of which the defendant drew six and the plaintiff ten. Very unfortunately, I think, one of those lots contained the sale-certificate of 1895, and the other the mortgage-deed of 1894. The former was drawn by the defendant, who has ever since been in actual possession of the property. The latter was drawn by the minor plaintiff, who now seeks to enforce it against the defendant, as though the relations subsisting between them were the ordinary relations of mortgagor and motgagee.

In our opinion, it is clear that after what has occurred in 1895, Govind could have had no right to sue himself in a double capacity as mortgagee under the mortgage of 1894, and mortgagor under the sale-certificate of 1895. We think that as he could have had no cause of action against himself, it is impossible that those who claim under him as heirs should have any cause of action against each other upon the same materials. For these reasons, we are of opinion, that the decision of the lower appellate Court is right and ought to be confirmed with all costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Macleod.

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October 3

BEHRAM RASHID IRANI (ORIGINAL DEFENDANT), APPELLANT, v. SORABJI RUSTOMJI ELAVIA (ORIGINAL PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), section 59—Equitable mortgage—Deposit of title-deeds of property situate in mofussil—Intention to create charge, proof of—Registration.

The plaintiff deposited with the defendant in Bombay title-deeds of his property situate at Nasik and borrowed a sum from the defendant.

* Second Appeal No. 236 of 1912.

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The defendant also at the same time executed in favour of the plaintiff a writing setting forth the clear intention of the defendant that the deposit of title-deeds should be security for the loan from the plaintiff and binding the defendant to execute on demand a proper legal mortgage of the property covered by the title-deeds deposited. This writing, which was the only evidence available of the defendant's intentions in making the deposit of title-deeds, was not registered.

Held, that the deed required registration as it created a charge upon the property; that in its absence there was no evidence whatever of intention to connect the deposit of title-deeds with the debt, and that the mere fact that there was a subsequent or contemporaneous loan was not sufficient in law to warrant a presumption apart from any other evidence that the contemporaneous or antecedent deposit of title-deeds was necessarily made as security for the loan.

SECOND appeal from the decision of C. E. Palmer, District Judge of Nasik, reversing the decree passed by Gulabdas Laldas, First Class Subordinate Judge at Nasik.

Suit on mortgage.

The defendant deposited with the plaintiff in Bombay the title-deeds of his property situated in Nasik. At the same time, he borrowed Rs. 300 from the plaintiff. The defendant also executed an unregistered deed in favour of the plaintiff *acknowledging the equitable mortgage* by deposit of title-deeds and agreeing that his property was security for the loan.

The plaintiff sued to recover the amount he had lent with interest. The Subordinate Judge held that the equitable mortgage sued on could be enforced in Nasik, that the deed was compulsorily registrable. He found the mortgage not proved and dismissed the suit. On appeal, the District Judge came to the conclusion that the deed did not require registration and that the mortgage was proved. He, therefore, decreed the suit.

The defendant appealed to the High Court.

P. B. Shingne, for the appellant.

K. N. Koyajee, for the respondent.

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BEAMAN, J. :—In February 1907 the defendant deposited title-deeds of certain property in the Zilla of Nasik with the plaintiff. The plaintiff advanced to the defendant a sum of money and the present suit has been brought upon the footing of the said deposit which was made in the City of Bombay being an equitable mortgage of the Nasik property. I doubt much whether the Legislature ever intended to extend the doctrine of equitable mortgage by mere deposit of deeds in Bombay to lands lying anywhere outside Bombay. But as the section is worded I will not press that doubt here. Now, an equitable mortgage under section 59 of the Transfer of Property Act needs three facts to be proved: (1) a debt, (2) deposit of title-deeds, and (3) an intention that the latter should be security for the former. I have often had to notice in these Courts the growth of the doctrine of equitable mortgage which was very summarily introduced by three judgments of Lord Thurlow given in rapid succession. The doctrine thus created, amounted at that time to very much what the law now is, as I have just expressed it, although the learned Chancellor, I think, lent strongly to the supposed legal presumption arising from the fact of indebtedness and the contemporaneous or subsequent deposit of title-deeds. Then for the better part of a century, the Courts in England virtually adopted this presumption as a presumption of law and the need of proving intention almost disappeared. Latterly, however, the legal doctrine in England veered in the opposite direction and the Courts began to insist more and more strongly upon the proof of intention as a question of fact, and that has been embodied in our own statute law and that is the law we have to administer.

Now, the difficulty in the present case arises out of the manner in which the plaintiff has sought to discharge

the burden of proof upon this question of fact. He has offered in evidence a contemporaneous writing or agreement which does no doubt fully set forth the very clear intention of the defendant that the deposit of the title-deeds should be a security for the loan to be advanced on or before the signature of that agreement, and the paper goes on to bind the defendant to execute upon demand a proper legal mortgage of the property covered by the title-deeds deposited. It appears to me that having regard to the opening part of that document, it does in itself create a charge upon the property and is, viewed in that light, compulsorily registrable. I am not disposed here to go into the very nice questions which arise and have often been discussed in this and the other High Courts upon contemporaneous writings of this kind, the question being usually whether these writings do in themselves create a mortgage or are merely subsequent records of it or anticipatory statements *leading up to it. But I may observe speaking* generally that no equitable mortgage is ever "created" by a writing. It is of the very essence of the equitable mortgage that it comes into being without any writing by the mere conjunction of certain facts. The inclination of my own mind has always been very strongly against any conclusion which implies that an equitable mortgage needs any such contemporaneous writing for its complete legal effect and consequences, and I think, *rightly* and logically viewed, this writing can never be put higher than proof of the intention of parties. Where it is limited to an agreement to execute a legal mortgage, if called upon to do so. I should doubt myself whether it would ever be compulsorily registrable. But as I say that question is one of much nicety and opinions have differed widely upon it. I do not consider it necessary to go further into it here because in my opinion this agreement requires registra-

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tion in itself, because it creates, very clearly creates, a charge upon the property to the extent of more than Rs. 100, and that being so, it is compulsorily registrable and cannot be received in evidence of any transaction relating to or affecting that immovable property. Now, if this document be excluded on this ground, as I think it must be, there remains no evidence whatever of intention to connect the deposit of title-deeds with the loan borrowed by the defendant from the plaintiff, and the mere fact that there was a subsequent or contemporaneous loan is not now in my opinion sufficient in law to warrant a presumption, apart from any other evidence that the contemporaneous or antecedent deposit of title-deeds was necessarily made as security for the loan. That is to say, on the question of fact there is absolutely no evidence, apart from this writing, which cannot be admitted to discharge the onus of proof which lies upon the plaintiff, and that is the ground to which I would prefer to restrict myself in reversing the decree of the lower appellate Court, restoring the decree of the Court of first instance and dismissing the plaintiff's suit with all costs.

MACLEOD, J.:—I agree with my brother Beaman that this appeal must be allowed, and that the decree of the lower Court dismissing the suit must be restored, the plaintiff paying the costs throughout. It has been held by the High Courts of Calcutta and Allahabad that in the case of deposit of title-deeds actually made in the towns mentioned in section 59, the mortgage can be effected irrespective of the situation of the property to which the title-deeds refer. I do not think there is anything in the contention, that in the case of an equitable mortgage, property in the mofussil cannot be affected by a deposit of title-deeds in Bombay. In this case it appears to me that the plaintiff in order to prove his mortgage must rely on the document of the 9th of

February 1907. That is the only evidence of the contract, and, as it requires registration, a contract of mortgage cannot be proved. Plaintiff therefore must fail.

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Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah

TULJARAM HARICHAND GUJAR (ORIGINAL PLAINTIFF), APPELLANT, v. SITARAM NARAYAN KUSAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1913 October 31

Civil Procedure Code (Act V of 1908), Order V, Rule 5—Suit on mortgage—First summons to be for settlement of issues and not for final disposal—Practice and Procedure.

In 1910 a mortgage suit was filed. The plaintiff having died, the name of his son was substituted in place of his name on the 13th April 1912 On the same day, the Court issued summons for the first time to the defendants, for final disposal On the day fixed for hearing, the Court raised issues, and as neither party had witnesses ready, the Court found the claim not proved in absence of evidence. The plaintiff having appealed —

Held, reversing the decree, that there was a miscarriage of justice in the way the case had been disposed of The scheme of the Civil Procedure Code required, in cases like the present, that the parties should have the opportunity to produce evidence relevant to issues framed after ascertaining matters as to which the parties were in dispute

Held, further, that the summons to the defendants should have been for settlement of issues and not for final disposal

SECOND appeal from the decision of W. T. W Baker, Acting District Judge of Satara, confirming the decree passed by V. R. Kulkarni, Subordinate Judge at Rahimatpur.

Suit on mortgage.

* Second Appeal No 810 of 1913.

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TULJARAM HARICHAND v. SITARAM NARAYAN.

The suit was filed in 1910 by one Harichand. He died in April 1912. The name of his son Tuljaram was substituted in place of his name on the 13th April 1912. On the same day, the Court fixed the day of hearing for the 1st June 1913 and ordered summons to issue to the defendants, for final disposal. On the day of hearing, both parties were present, but none had brought any witnesses. The Court raised one issue: Is the bond proved; and finding it not proved in absence of evidence dismissed the suit.

On appeal, the District Judge summarily rejected the appeal.

The plaintiff appealed to the High Court.

D. G. Dalvi, for the appellant.

A. V. Lele, for respondent No. 1.

HEATON, J.:—In this case my opinion is that there has been a miscarriage of justice owing to a want of understanding of the intention of the Procedure Code.

A suit No. 685 was filed in 1910. Up to the 13th of April 1912 a summons had not been served on the defendant. On that date the present plaintiff applied to have his name entered in the place of his deceased father who was the original plaintiff. That application was granted, and the 1st of June was fixed for the final disposal of the suit. A notice was issued to the defendant to appear on that day with his witnesses. On the 1st of June the plaintiff appeared and the defendant also appeared and put in a written statement, but neither party produced any witnesses. The suit was a mortgage suit, and in his written statement the defendant denied that he had executed the mortgage-deed or had incurred the debt sued for. This, therefore, was eminently a case in which all the issues arising out of the contentions should have been framed and moreover one in which it was very desirable to examine

the parties before framing issues; and yet the case was disposed of as it had been correctly fixed for final disposal at the first hearing; and as if it could be properly disposed of at once; although the contentions of the parties were as I have mentioned; and although the scheme of the Code requires, in cases of such a nature, that the parties should have the opportunity to produce evidence relevant to issues which are framed after ascertaining exactly those matters as to which the parties were in dispute. In disposing of the suit in the way which was adopted, I think, as I have said at first, that there was a miscarriage of justice, and a miscarriage of justice due to an absolute misappreciation of the meaning and intention of the Code of Civil Procedure. I would invite the attention of the Subordinate Judge and the District Judge to paragraph 5 of the introduction to the Manual of Circulars of this Court and also to Rule 5 of Order V of the Code of Civil Procedure. It is for the Court to determine at the time of issuing the summons whether it should be for the settlement of issues only or for the final disposal of the suit. And if our Courts are in the habit of issuing summonses for final disposal in mortgage suits, they make a mistake at the very beginning. And if they further proceed to treat these suits as if the summons for final disposal were properly issued, then they must in many cases, as in this, encourage not the doing but the failure of justice. For these reasons I consider that the order in appeal and the order of the first Court are alike wrong, that the case has been wrongly decided without a fair trial, and I would direct that the case should be remanded to the first Court for the framing of issues and a trial according to law

I would add this: This suit of 1910 which was set down for final disposal was an old suit and it is of undoubted importance that suits should not be allowed

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to remain undisposed of for long periods; but although the fact that a suit is one of long standing is an excellent reason for fixing an early date for its disposal, it is no reason at all why it should be disposed of in a manner not contemplated by our Code.

The order is that the decrees of both the Courts are set aside and the case is remanded for proper issues to be framed and to be tried in accordance with law.

Costs to abide the result.

SHAH, J.:—I am of the same opinion. Having regard to the nature of the suit, the summons, in my opinion, under Rule 5, Order V, should have been only for the settlement of issues and not for the final disposal of the suit. But when the written statement was filed in this case on the 1st of June and several contentions were raised by the defendant, the trial Court should have under Order XV, Rule 4, after framing and recording issues, adjourned the suit for the production of such evidence as may be necessary for the decision upon such issues. I agree generally with the observations of my learned brother as regards the desirability of issuing summonses for final disposal of suits only in simple cases. In a case in which the summons may have issued for final disposal, if, after the written statement is filed, the suit is found to involve issues of a less simple character than might have been anticipated at the outset, it is desirable in the interests of justice that the discretion given to the Court under Rule 4, Order XV, should be so exercised as to ensure a fair trial and not to deny in effect the trial to the parties.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Shah.

RASUL KARIM AND ANOTHER (ORIGINAL DEFENDANTS) APPLICANTS, v. PIRUBHAI AMIRBHAI (ORIGINAL PLAINTIFF), OPPONENT.* 1914. *January 16.*

Civil Procedure Code (Act V of 1908), Order XXXIX, Rule 2—Interlocutory injunction—Mandatory injunction—Power of Court to grant, pending trial.

The defendants erected on their own land a screen for blocking up the openings which the plaintiff had made in his wall. The plaintiff filed a suit to have the screen removed, and pending the suit applied for and obtained a mandatory injunction directing the defendants to remove the screen. The defendants applied to the High Court.

Held, setting aside the order that the lower Court had acted illegally and with material irregularity in the exercise of its jurisdiction, in granting the mandatory injunction.

Quære. Whether a mandatory injunction can be considered as a "temporary" injunction under Order XXXIX, Rule 2 of the Code of Civil Procedure?

THIS was an application under the civil extraordinary jurisdiction of the High Court, against an order passed by P. J. Taleyarkhan, District Judge of Broach, confirming an order passed by Mohanrai Dolatrai, First Class Subordinate Judge of Broach.

The defendants owned a house in Broach to the east of which was a *chhindi* (an open piece of land). To the east of this *chhindi* was the plaintiff's house, which was built in 1899, and in which plaintiff had opened new doors and windows overlooking the *chhindi.*

The defendants filed a suit against the plaintiff in 1899 to have the openings closed. The Court ordered in that suit that the defendants could not compel the plaintiff to close up the openings, but that they were at

* Civil Extraordinary Application No. 230 of 1913.

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liberty to block them up by any construction on their land.

In 1913 the defendants erected a screen of corrugated iron sheets to block up the openings. The plaintiff filed a suit against the defendants to have the screen removed and pending the suit obtained a mandatory injunction from the Court directing the defendants to remove the screen.

On appeal the District Judge upheld the order granting the injunction.

The defendants applied to the High Court under its extraordinary civil jurisdiction.

G. N. Thakore, for the applicant :—The Court has no *power to grant a mandatory injunction under Order* XXXIX, Rule 2 of the Civil Procedure Code. The Specific Relief Act (I of 1877) treats a mandatory injunction as distinct from other injunctions (sections 54, 55). The English Law is different: see The Judicature Act, 1873, section 25; Order L, Rule 6: *Gale* v. *Abbot*[1]; *Johnstone* v. *Royal Courts of Justice Chambers Company*[2].

G. K. Parekh, for the opponent :—The grant of a mandatory injunction is justified by Order XXXIX, Rule 2. The defence will not be prejudiced, as we undertake to restore the erection at our expense if the decision goes against us. The grant of injunction is within the discretion of the Court. This Court cannot interfere with the exercise of that discretion under section 115 of the Civil Procedure Code, 1908.

BEAMAN, J. :—I think this is a proper case for the exercise of this Court's revisional powers. The question raised is one of some general interest depending upon a principle. The manner in which the question is

(1) (1862) 8 Jur. (N. S.) 987 at p. 988. (2) [1883] W. N. 5.

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raised is this. The plaintiff brought a suit the object of which was to obtain an order directing the defendant *to pull down an erection consisting of corrugated iron* sheets which the plaintiff alleged obstructed and invaded his easement of ancient light and air. That being the nature of the suit an interlocutory application was made and acceded to by the learned Subordinate Judge who ordered the defendant to pull down the erection he had put up, and this order was confirmed on appeal by the learned District Judge. It has always been, in my opinion, a very open question whether in strictness a mandatory injunction can properly be made on interlocutory applications. In England whatever doubts may have existed on this point may be said to have been removed by section 25 of the Judicature Act, and it has long been a common-place in the text-books that the Courts indubitably have the power to make mandatory injunctions on interlocutory motions.

An examination of the case-law upon which this dictum rests is very interesting, and it confirms my impression speaking generally that there can hardly be a case of a true mandatory injunction which could be given upon an interlocutory application without virtually prejudging and deciding in anticipation a part or whole of the suit according to the extent and scope of the mandatory injunction. For example, in one of the earliest cases, that of *Robinson* v. *Lord Byron*[1], upon which I think most of the succeeding cases as well as the passages in accredited text-books rely, the Lord Chancellor, Lord Thurlow, after considerable doubt and hesitation as to the appropriate language thought that before the hearing he might issue a mandatory injunction to the defendant Lord Byron. But the facts of that case were rather peculiar, and in truth, looking to the form the Lord Chancellor's injunction took, it

[1] (1785) 1 Brown C. C. 588.

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would be hard to say that it really went much beyond an ordinary prohibitory injunction which of course can always be granted in such suits. The facts as far as I remember them were that Lord Byron had the control of large quantities of water and by means of sluices and dams he continually overflowed or starved the plaintiff's mill. The plaintiff brought a suit for an injunction restraining Lord Byron from thus playing fast and loose with the water-supply; and it was admitted on affidavits at the hearing of the interlocutory motion that the defendant was acting in this manner with the deliberate intention of extorting money from the plaintiff. Thereupon the Lord Chancellor framed an injunction the effect of which was that Lord Byron was restrained from using his power over the water in any other manner than he had been doing prior to the suit. Now it is clear that this is a very unusual injunction and when properly analysed its effect might be restricted to future acts, which is the effect of all true interlocutory prohibitory injunctions. But I admit that the line is drawn very fine, for practically in obeying the injunction it might be that Lord Byron would have had to open some sluices he had already closed or close some sluices he had already opened.

Now the difficulty which the learned English Judges always appear to have felt about the form of an interlocutory injunction which was intended to be mandatory is also fully exemplified in the case of *Allport* v. *Securities Company Limited*[1] There the plaintiff occupied a room in a certain building and the defendant had removed a staircase leading up to this room. The plaintiff accordingly brought a suit complaining that he was shut off from all access to his room except by a comparatively inconvenient back staircase, and asked the Court to direct the defendant to reconstruct the staircase and to

[1] (1895) 72 L. T. 533.

refrain in future from any such interference with the plaintiff's right. The case was tried, before North, J.: and that very learned Judge on an interlocutory application was thoroughly satisfied that a grievous injury had already been done to the plaintiff and needed immediate remedy. So that he framed his injunction, *in what I cannot help thinking, regarding it merely as* a grammatical composition, this remarkable manner, "an injunction to go against the defendant to refrain from allowing the staircase to continue removed". Now in so far as any future operation could be given to any negative form of that kind, it appears to me that the *injunction was meaningless, but of course its operation* was exactly the same as though the learned Judge had positively ordered the defendant to rebuild the staircase. And that was prejudging and deciding the whole suit. This was virtually conceded by the learned Judge who said that although the matter was only before him on affidavits he was perfectly satisfied that the defendant could make out no better case at the hearing. In these circumstances it certainly appears to me that there was little use in having a further hearing at all.

Then again in another very instructive case decided long before the one I have last mentioned, I mean the case of *Hervey* v. *Smith*[1], there was certainly a real instance of a mandatory injunction required and granted very closely resembling the injunction with which we are dealing in this case. There stood between the parties a wall which was alleged to be a party wall containing flues for smoke to pass from the rooms in the adjoining tenements, and the defendant apparently suddenly placed tiles on the tops of the chimneys with the result that very great inconvenience was caused to the plaintiff On an interlocutory application the Vice

(1) (1855) 1 K & J 389

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Chancellor, Page Wood, held that having regard to the great inconvenience occasioned to the plaintiff, and the numerous and delicate equities involved in the case, there could be no harm in directing the defendant upon this interlocutory application immediately to remove the tiles. I think that this is really referable to a doctrine, which I believe was long prevalent in England, that the issue of mandatory injunctions on interlocutory applications could most properly be made in matters of nuisance, where the continuing nuisance even up to the hearing might affect the health or life of the plaintiff. Analysis shows that this doctrine is infected with the same illogicality for the issue of the mandatory injunction presupposes the success of the plaintiff in the suit and is precipitated for the reason that deferring the remedy may be dangerous; but suppose the defendant succeeds, it is clear that the ground would be cut away from under this principle and the plaintiff would have to put up with the nuisance however dangerous.

However that may be there can be no question but that in this case, although the form in which the injunction was given was negative, the injunction itself was mandatory, and as I have said, was in many respects much akin to the injunction with which we are now dealing, for the removal of these tiles although a definite and completed act was one which could have been done in a few minutes and really entailed no great expense upon the defendant.

An examination of this and many other cases which I have gone through, however, leaves me unshaken in the opinion that in strictness no mandatory injunction upon an interlocutory proceeding can ever be temporary. If we analyse the contents of any true mandatory injunction, where we get one relieved from all complicating details such as those which exist in Lord Byron's case, it would be found to involve the doing of a definite

act, whereas all true interlocutory prohibitory injunctions merely prevent the party enjoined from doing the act for a certain period. The latter are therefore all truly temporary while the former never can be. It is only by a loose use of language and a confusion of ideas that any true mandatory injunction compelling the performance of an act can be said to be temporary. The reason why this principle is not so easy to ascertain in Lord Byron's case is because the scope of the injunction went considerably beyond the doing of one definite act, and presupposing not only the possibility but the likelihood of a continuing set of acts of the like character in future practically prohibited those future acts from being done. But if we take the case of *Hervey* v. *Smith*[1], it will be seen at once that as soon as the defendant Smith was ordered to remove the tiles, although nominally they were only to be removed till the suit was heard, yet the moment the injunction was obeyed the act was done and nothing was left to do. The confusion, I think, arises out of the use of the word 'temporary' in its extended sense. It sounds as though an injunction might be temporary which orders a man to remove a tile or pull down a screen, as in the present case, for a month or until the hearing of the suit, but on examination it must become clear that no element of time in that sense enters into the injunction at all, and the true distinction between these classes of injunctions then comes into relief. That distinction I think may be made more commonly intelligible not by the use of such words as 'permanent' and 'temporary' but by the use of such words as 'provisional' and 'final'. To give a very homely illustration, you might properly enjoin a man to refrain from eating an apple for an hour, but you cannot order a man to eat an apple for an hour, that is to say meaning that at the end of the hour his condition

[1] (1855) 1 K. & J. 389.

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is to be the same as though he had not eaten the apple. Having once eaten it the act cannot be undone, and if apples do not agree with him his digestion may be permanently disarranged. And that is the same I believe in the case of every true mandatory injunction. The man who is ordered to remove tiles or pull down buildings, if he obeys the injunction, may after the hearing of the suit be allowed to replace or put them up again, but that is certainly not restoring him to the condition in which he was before the injunction was issued and obeyed. And the true intent of all interlocutory, that is to say temporary prohibitory injunctions, is one and the same, to maintain the subject-matter of the suit *in statu quo* until the Court at the hearing is in a position to decide finally the rights between the parties. I expect that the constant reiteration of the passage in the text-books is largely due to the sweeping and unqualified dictum of Fry, L. J., in the case of *Bonner* v. *Great Western Railway Company*[1], in which that learned Lord Justice says that no doubt can be entertained as to the power of the Court to issue a mandatory injunction in a proper case upon an interlocutory application. That case was decided in 1883, ten years after the passing of the Judicature Act, and as I have said in that Act Legislative sanction was conferred upon the old though not very confident opinion of the English Judges. But the object of my observations and criticism of these cases has been to emphasize a distinction which may exist in principle, and certainly does exist in language, between the provisions of the statute law in England and in India.

If we turn to Order XXXIX, Rules 1 and 2, which govern all the Courts of the moffusil in India, it will be observed that the issue of injunctions upon interlocutory applications is designedly confined to temporary injunc-

(1) (1883) 24 Ch D 1.

tions, and speaking for myself I do entertain some doubt whether the Courts in India have any right to assume that in this respect they are on the same footing as the Courts in England, and have the power and a discretion to issue mandatory injunctions upon interlocutory applications. It is obvious that if this were done the discretion would have to be constantly and narrowly scrutinized, for in every case of the kind, as I believe I have shown, the issue of such a mandatory injunction practically prejudges the suit, and there may be other practical inconveniences of a lesser degree, such as for example that by pulling down a structure of which the plaintiff complains before suit the Court might not be in a position to determine at the hearing whether such structure did or did not interfere with the easements which the plaintiff wished to have confirmed, or if it did interfere then to what extent so as to be able to decide whether the remedy should be by injunction or damages.

It is true that in the present case Mr. Thakore does not put a very high value upon the screens which have been put up, or contend that pulling them down would involve the defendant in heavy expense, and Mr. Gokuldas has volunteered to undertake that any expense so incurred should be refunded to the defendant by the plaintiff if the suit is finally decided in his favour. That of course might meet the requirements of a particular case, but it does not really touch the principle which I am considering. And it certainly appears to me most undesirable that what is ultimately to be decided at the hearing should thus be prejudged and relief given in anticipation, nor does the reasoning of the learned Judges below commend itself to me. They appear to think that because it is common ground that the plaintiff's windows have enjoyed light and air for fourteen years a presumption arises in his favour, and

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that no doubt has weighed very much with both the learned Judges below in granting in the first instance and afterwards confirming this mandatory injunction. It ought to be obvious however, though there is a singular instance of a like misapprehension in England in the case of *Bonner* v. *Great Western Railway Company* to which I have already alluded, that a party claiming easements of light and air upon an allegation of less than twenty years' enjoyment has no right at all, and therefore, if the admissions go no further back than fourteen years no presumption can possibly arise in the plaintiff's favour. Entertaining the doubt I do whether in any case the moffusil Courts have the power to issue mandatory injunctions on interlocutory applications, it appears to me that upon grounds of general expediency the proper course where applications of that kind are made would be rather to expedite the proceedings than to grant an injunction, and where the matter is really one of urgency as in the case of pestilent nuisances, and the Court feels that it ought to interfere at the earlier stage something like the procedure which I think is not infrequently adopted in England might be followed in this country, I mean that the order upon the interlocutory application might be treated as a decree in the suit. If that were done then the illogicality or most of it which infects every case I have examined on this point would of course be removed. But unless it is done there always will be this objection to the issue of any such order that in proportion to its scope it concludes the whole or part of the case, and that merely upon affidavits and before the hearing upon proper evidence. In the particular case I feel that it might be a real hardship to the defendant to order him thus summarily to pull down his screens and wait the result of the suit before being allowed to put them up again, and for that reason, particularly in view of the considerations which

influenced the learned Judges in granting and upholding this mandatory injunction, I think, that this Court could properly interfere in the exercise of its extraordinary jurisdiction. I gravely doubt whether the moffusil Courts of this country have any jurisdiction to grant mandatory injunctions before the hearing. For our legislature has restricted the power of these Courts to the making of temporary injunctions only upon interlocutory motions; and I hope I have shown that no true mandatory injunction can ever be "temporary". But assuming that there was the jurisdiction I still think that this was a case in which no such injunction ought to have been issued, and that not only upon the particular facts but with regard to general and far-reaching principles. So that it would not be an abuse of language to say that the Court in the exercise of its jurisdiction had acted in my opinion illegally and with material irregularity. We are therefore agreed that the mandatory portion of the injunction of which alone complaint has been made to us here ought to be set aside, and we think that all costs of this might well be made costs in the cause.

SHAH, J.:—I do not desire to decide the general question argued on this application, *viz.*, whether the Courts have power under Order XXXIX, Rule 2, to make an order restraining a defendant from committing the injury complained of, which may render it necessary for him to undo what may have been done by him before the suit. There can be no doubt that the English Courts have the power to grant mandatory injunctions on interlocutory applications (see Halsbury's Laws of England, Vol. XVII, para. 189). I am not sure that the Indian Courts have not similar powers under Rule 2 of Order XXXIX.

But assuming without deciding, that the Courts have the power to grant such temporary relief, it is clear that

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it must be exercised with great caution, and in strict conformity with the provisions of the Civil Procedure Code. In this case the mandatory injunction directing the defendant to remove the partition does not appear to me to conform to the provisions of the rule in question. Having regard to the pleadings, as also to the reasons given by the lower Courts for granting a mandatory injunction, I feel satisfied that there has been a material irregularity in making such an order.

I, therefore, agree in the order proposed by my learned brother.

Order set aside.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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NARAYAN BALKRISHNA KULKARNI (ORIGINAL DEFENDANT 2), APPELLANT, v. GOPAL JIV GHADI AND OTHERS (ORIGINAL PLAINTIFFS) RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sections 2, 97, Order XXVI, Rules 11, 12 (2)—Dekkhan Agriculturists' Relief Act (XVII of 1879)—Redemption suit—Direction to a Commissioner to take account—The direction not a preliminary decree.

In a redemption suit tried under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the first Court, on the 15th August 1910, referred the taking of the account to a Commissioner and on the 30th August 1910 passed a decree for the plaintiffs for possession free from incumbrances, the defendants having received profits for 25 years after the debt had been paid off.

One of the defendants having appealed on the 10th October 1910, the appellate Court dismissed the appeal as time-barred on a preliminary objection taken by the plaintiff-respondents, namely, that the period of 30 days for the appeal ran from the date when the Court issued the commission to the Commissioner on the 15th August 1910 because the issue of commission constituted a preliminary decree within the definition of section 2 of the Civil Procedure Code (Act V of 1908).

* Appeal No. 138 of 1912.

The defendant having appealed to the High Court,

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Held, reversing the decree of the appellate Court and remanding the case for disposal on the merits, that there was nothing in the Civil Procedure Code (Act V of 1908) which prevented the appellate Court from entertaining the appeal inasmuch as there was not a preliminary decree within the meaning of section 97 of the Code, that in applying the definition of decree contained in section 2 of the Civil Procedure Code (Act V of 1908) the right of the parties in respect to matters in controversy should be taken to mean the general rights in relation to status, in relation to jurisdiction, in relation to limitation, in relation to frame of the suit and in relation to liability to account which, if decided, must have a general effect upon the proceedings in the suit and could be decided preliminary to the investigation of the matters in dispute between the parties upon the merits.

Krishnaji v. Maruti[1], explained

SECOND appeal from the decision of V. G. Kaduskar, Additional First Class Subordinate Judge of Ratnagiri with appellate powers, rejecting as time-barred an appeal against the decree of V. N. Navaratna, Subordinate Judge of Devgad.

Redemption suit.

The plaintiff sued in the year 1909 to have an account taken under the provisions of the Dekkhan Agriculturists' Relief Act of all the transactions from commencement in connection with two mortgages of the 20th and the 21st December 1865, to have the amount due determined and to have a decree for redemption passed.

The defendants answered *inter alia* that they had become full owners of some portions of the mortgaged property and the plaintiffs had no right to redeem the said portions and that they had no objection to the account being taken as prayed for by the plaintiffs.

At the trial the Subordinate Judge passed an order on the 15th August 1910 for the appointment of a Commissioner to make an account in the light of the instructions given by the Court, and the Commissioner submitted a report stating that "the debt was

(1) (1910) 12 Bom. L. R. 762

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paid off out of the profits of the property by 1884-85". Neither party having offered any objections to the Commissioner's report, the Subordinate Judge found that the whole debt had been paid out of the profits of the mortgaged property and passed a decree on the 30th August 1910 directing the plaintiffs to recover possession of the property described in the plaint except survey No. 92, pót No. 4, free from all incumbrances, the defendants having received profits for 25 years after the debt was paid off.

Defendant 2 having appealed on the 10th October 1910 the appellate Court dismissed the appeal as time-barred for the following reasons :—

The respondents' pleader takes a preliminary objection that the appellant's appeal as regards the decision of 15th August 1910 is time-barred, the appeal being filed more than 30 days after that decision.

Mr. Parulekar urges that no formal decree being drawn up in accordance with that decision, that decision was not appealable and that his present appeal is in time being filed within 30 days after the lower Court drew up its final decree. I feel myself unable to accept this contention. The decision of the lower Court on the 15th August was evidently the formal expression of an adjudication which so far as regards that Court conclusively determined the rights of the parties with regard to the manner in which accounts should be taken, and is therefore a preliminary decree within the meaning of section 2 of the Code and as such was appealable. That that adjudication was a preliminary decree is beyond doubt and it is equally evident that that decree was appealable. The appellant cannot urge in support of his position the omission of the lower Court to draw up a formal decree in accordance with that decision. It is true that the appellant could not have appealed against the decision, in the absence of a formal decree as held by the Bombay High Court in the case reported in Bombay Law Reporter, XI Volume, page 1, for the simple reason that there is no appeal against a judgment merely but that an appeal only lies against a decree, and the provisions of the Civil Procedure Code show that a decree is different from a judgment, though the decree follows the directions contained in the judgment. But although the appellant could not have appealed against the decision of the 15th August in the absence of a formal decree, he should have moved the lower Court to draw up that decree to enable him to appeal legally against that decision, and if he did not do that he alone is to blame if his present appeal is time-barred, as was said of the appellant in the case

reported in Bombay Law Reporter, XI Volume, page 1326, by His Lordship, the learned Chief Justice, of the Bombay High Court. By his omitting to follow the course mentioned above, the appellant could not extend the period provided by law for appealing against the decision of the 15th August. The present appeal has been preferred more than three months after that decision, and as the present appeal is directed solely against the decision of the 15th August, I must find that the appeal is time-barred.

Defendant 2 preferred an appeal.

K. N. Koyaji for the appellant (defendant 2) :—The lower appeal Court erred in supposing that the instructions to the Commissioner on the various points therein discussed constituted a preliminary decree. No rights of the parties were conclusively determined by those instructions, even though definite opinion might have been pronounced by the Subordinate Judge on several points of dispute. After receipt of the report of the Commissioner which formed part of the evidence in the case, it would be open to the Judge to abandon or alter his former opinion on any particular point. The rulings relied on by the lower Court do not apply as in those rulings questions of jurisdiction or of status or of some rights of the parties had been finally determined.

A. G. Desai for the respondents (plaintiffs) :—In the order of reference issued to the Commissioner the Court discussed and definitely decided the various points arising in the case and only required the Commissioner to make calculations in accordance with the definite findings and report the result of his calculations. The Commissioner and the parties were bound by those findings. The findings conclusively determined the rights of the parties "with regard to the manner in which accounts should be taken": *Krishnaji* v. *Maruti*[1]. Under Order XXXIV, Rule 7 of the Civil Procedure Code the Court has to pass a preliminary decree ordering accounts to be taken : *Sadhanath Dhonddev* v. *Ganesh Govind*[2].

[1] (1910) 12 Bom. L. R. 762. [2] (1912) 37 Bom. 60.

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SCOTT, C. J. :—The plaintiffs sued to have an account taken under the provisions of the Dekkhan Agriculturists' Relief Act of all transactions from the commencement in connection with two mortgages of the 20th December 1865 and the 21st December 1865, and to have the amount due determined, and to obtain a decree for redemption.

The learned Subordinate Judge on the 30th of August 1910 passed a decree for the plaintiffs for possession of the property, except one survey number, free from incumbrances, the defendants having received profits for 25 years after the debt had been paid off. Before passing that decree the learned Judge had investigated certain questions of fact in issue between the parties with reference to the amounts due in respect of different mortgages and different plots of land. Then instead of making up the final mortgage account himself he, as is permissible under the Civil Procedure Code, referred the taking of the account to a Commissioner. The Code provides, Order XXVI, Rule 11, that "In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment"; and Rule 12 (2) provides that "The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit". In the present case the work of the Commissioner appears merely to have been the ascertainment of the figures based upon the facts found by the Subordinate Judge, and the figures having been furnished by the Commissioner, and neither party objecting, the Court found the fact to be that the whole debt had been paid out of the profits of the mortgage-property, and passed the decree already referred to.

From that decree an appeal was preferred to the First Class Subordinate Judge, with appellate powers, and a preliminary objection was taken that the appeal was time-barred, inasmuch as time ran from the date when the Court issued the commission to the Commissioner to take the account, on the ground that that issue of a commission or the instructions which were recorded for the benefit of the Commissioner at the time of the issue of commission constituted a preliminary decree within the definition of section 2 of the Civil Procedure Code. This preliminary point found favour with the appellate Court and the appeal was accordingly dismissed, because the matters decided by the Subordinate Judge on the question in issue between the parties were decided in fact by the 15th of August when he issued his directions to the Commissioner.

The learned Judge of the appellate Court held the decision of the 15th of August to be the formal expression of an adjudication which, so far as regarded the Court of the Subordinate Judge, conclusively determined the rights of the parties *with regard to the manner in which accounts should be taken*, and was therefore a preliminary decree within the meaning of section 2 of the Code, and as such was appealable. The words "with regard to the manner in which accounts should be taken" appear to have been selected from a judgment of this Court in *Krishnaji* v. *Maruti*[1] but they were selected without due regard to the question which was before the Court in that case. The question was as to the status of the plaintiff, whether he was entitled to the special rights of the favoured class under the Dekkhan Agriculturists' Relief Act in the matter of demanding accounts from the mortgagee. It was a decision with regard to the general right of the plaintiff and the general liability of the defendant without

[1] (1910) 12 Bom. L. R. 762

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reference to particular questions of fact which might be in issue between the parties in an investigation of the merits of their particular cases after it had been decided what law was applicable to them. In applying the definition of the Civil Procedure Code of 1908, section 2, it will be found that in the reported cases in this Court the right of the parties in regard to matters in controversy is taken to mean general rights such as rights in relation to status, in relation to jurisdiction, in relation to limitation, in relation to frame of the suit and in relation to liability to account, which if decided must have a general effect upon the proceedings in the suit and can be decided preliminary to the investigation of the matters in dispute between the parties upon the merits.

In the present case what was decided on the 15th of August at the time of the issue of the commission was not any general question of right, such as has been referred to, but merely a number of different points in dispute upon the merits of the case between the parties. The learned Judge passed no decree upon the merits. He was waiting for the Commissioner to send in his calculation which would form an item in the evidence to be taken into consideration before framing the decree.

We, therefore, think that the learned Judge of the appellate Court was in error in dismissing this appeal, for there was nothing in the Code which prevented him from entertaining it inasmuch as there was not a preliminary decree within the meaning of section 97. We, therefore, set aside the decree and remand the case to the lower appellate Court for disposal on the merits.

Costs costs in the appeal.

Decree set aside and case remanded.

G. B. R.

PRIVY COUNCIL.*

CHUNILAL PARVATISHANKAR PLAINTIFF, v. BAI SAMRATH, DEFENDANT.

P. C.* 1913 December 3, 10, 19. 1914. March 17

[On appeal from the High Court of Judicature at Bombay.]

Hindu law—Will—Construction of will—Self-acquired property—Bequest dividing property between testator's two sons with gift over to survivor—Survivorship whether limited to survivorship during testator's life or extending to period after his death—Period of distribution.

A Hindu resident of Surat in the Presidency of Bombay made a will dated 20th August 1899 by which after appointing his two sons "executors, heirs and owners" of the whole of his property (which was self-acquired) and directing them to divide and take equal shares in it with certain exceptions, gave each of them a half share of his estate not specifically disposed of by the will. By clause 9 he made the following bequest, "I have divided between and given to my two sons the whole of my property as mentioned above. But should either of these two sons die without having had (leaving) any male issue the survivor of the said two sons is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue (behind him) after undertaking (to defray) the expenses in connection with the maintenance of his widow and marriage of his minor daughter. But under these circumstances the heirs of my deceased son Surajlal shall not get any right whatever." The testator died on 4th July 1901 leaving him surviving his two sons. The elder son died on 2nd January 1903 leaving a widow and a daughter. In a suit by the surviving son to enforce the provisions of clause 9 of the will, the High Court held that the period of distribution contemplated by the testator was the period of his death at which time half of his estate became vested in each of his sons absolutely and that clause 9 should be read as if the survivorship there provided was limited to survivorship at the death of the testator.

Held (reversing that decision) that the words of clause 9 were not limited to survivorship during the testator's life, but clearly pointed to survivorship whenever it should occur; and that the surviving son was as such survivor entitled to the estate conveyed by the clause, subject to the obligation imposed upon him of maintaining his brother's widow and daughter.

APPEAL from a judgment and decree (20th July 1910) of the High Court of Bombay, which reversed a judgment and decree (27th August 1908) of the Court of the

* *Present*:—Lord Shaw, Lord Moulton, and Mr. Ameer Ali.

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District Judge of Surat, which affirmed with a slight modification a judgment and decree (4th February 1907) of the Court of the Subordinate Judge of Surat.

The litigation which resulted in this appeal concerned the estate of one Parvatishankar Durgashankar, a Hindu resident of Surat, who died on 4th July 1901 leaving property both moveable and immoveable of the value of about Rs. 75,000. He left two sons Chunilal the appellant, and Shambhuprasad the husband of the respondent, and a grandson Dhirajlal the son of a predeceased son Surajlal who had separated from his father many years before and claimed no interest in the estate. By his will dated 10th August 1899 some two years before his death he purported to dispose of the whole of his property, by clause 2 appointing Chunilal and Shambhuprasad "heirs and owners" of it, and by clause 4 directing that they should divide and take in equal shares the whole of his immoveable property, with the exception of his interest in a mortgage on a plot of land which the testator bequeathed to Chunilal. In clause 7 he stated that he had divided his moveable property between his two sons in his life-time and had made over the same to them (this was after his death found not to be the case). Clause 9, the construction of which was the main question for determination in the present appeal, will be found set out in the judgment of the Judicial Committee.

After their father's death the two sons divided the property between them, the elder, Shambhuprasad, by agreement taking two houses in Surat and Chunilal taking the whole of the outstandings with the exception of a debt of Rs. 2,000 due from one Premchand Raichand. Shambhuprasad afterwards sold one of the two houses.

Shambhuprasad died on 2nd January 1903 without male issue, but leaving him surviving his widow Bai

Samrath, the respondent, and a minor daughter; and on 25th September 1903 Chunilal brought the present suit against Bai Samrath in which he claimed a declaration that he was entitled under the 9th clause of the will of Parvatishankar to the property which had formed the share of Shambhuprasad under the said will. He also claimed an injunction against Bai Samrath restraining her from denying his title, but did not ask for possession of the property or any part of it: nor did he claim nor make any reference to the house Shambhuprasad had sold.

Bai Samrath in her defence to the suit alleged *inter alia* that the property left by Parvatishankar was joint ancestral property over which he had no power of disposition by will: that clause 9 of the will had no operation upon the moveable property stated in the will to have been divided by the testator in his lifetime; and that having regard to the partition which had taken place between his two sons any rights of survivorship must be taken to have been waived. Certain funds in the Post Office Savings Bank were also claimed as being the separate property of Shambhuprasad, and an objection was raised as to the form of the suit.

On these pleadings the Subordinate Judge held that the property of the testator was self-acquired; that Bai Samrath as claiming through Shambhuprasad was estopped from denying the validity of the will which he held to be duly proved; that under clause 9 of the will the sons took only life estates or interests liable to be defeated by the death of either of them without male issue, and that the provisions of that clause were valid and operative upon the whole of the moveable property, as no division of it had in fact taken place in the testator's life-time; and that the rights of survivorship had not been waived or put an end to by the

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partition between the brothers. He also decided that Chunilal having allowed Shambhuprasad to deal with the property as his own, the houses must be treated as belonging to Shambhuprasad. As to the form of suit the Subordinate Judge held that Chunilal was entitled to sue for a declaration of his rights without asking for possession of the property, the prayer for an injunction being a sufficient compliance with the requirements of section 42 of the Specific Relief Act, 1877; but that such declaration could only be made in respect of such of the property as came to Shambhuprasad's share at the partition.

Both parties appealed to the Court of the District Judge who modified the decree of the Subordinate Judge by declaring that Chunilal was entitled to the house and property which Shambhuprasad inherited under the will, but otherwise affirmed the lower Court's decree.

From that decision Bai Samrath preferred a second appeal to the High Court, and that Court (Sir BASIL SCOTT, C.J., and BATCHELOR, J.) taking the facts as undisputed and hearing arguments only upon the construction of the will, held that clause 9 was intended to apply only in the event of one of the sons dying without male issue in the life-time of the testator, and on that ground the decree of the District Judge was reversed and the suit dismissed. The material portion of the judgment of the High Court was as follows :—Referring to clause 9 of the will the judgment proceeded :—

"Now that appears to us to be a provision for the event of the distribution as provided by the previous clauses of the will being impossible in consequence of the death without male issue of one of the devisees The period of distribution contemplated by the testator is clearly the period of his death, and under these circumstances the event which may interfere with that distribution and give rise to the necessity for other arrangements must be an event occurring prior to his death. This conclusion is strengthened by the last

words of the clause which provide that in the event mentioned in the clause the heirs of his deceased son Surajlal should not get any right whatever. They were not to get any right under the preceding clauses of the will, but if any portion of the testator's property were undisposed of by lapse in consequence of the death of one of his legatees the heirs of his deceased son would be entitled to succeed by inheritance if they were not excluded by the express terms of the will. This is the conclusion which we have arrived at from a discussion of the terms of this clause apart from authority English or Indian.

'It is, however, some satisfaction to find that the conclusion is in accordance with the rule adopted in England expressed by Lord Hatherley in *O'Mahoney* v *Burdett*[1], where he says 'where the Court has found upon the face of the will a positive direction to pay over the personalty to the legatee, or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the Courts have laid hold of that circumstance to say, "We hold this defeasance to be before that period of distribution arrives" holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed, and put into the hands of those who having it in their hands, will of course spend it without any further trust, and on the other hand that a subsequent event, namely a certain person's dying childless after that distribution has taken place should divest the property, that is to say, make it necessary for the executor to take steps to get back again, and recall that money which he has paid in order to hand it over to those who would take under the executory devise

On this appeal

De Gruyther K. C. and *J. M. Parikh* for the appellant contended that the High Court was wrong in its construction of the will. The period of distribution was not the death of the testator. Under the will the two sons took shares in the estate which were liable to be defeated on the death of either of them without leaving male issue; on the happening of that event at any time the survivor was to take the whole estate. The date of the survivorship was not intended to be limited to the case of one of the sons dying without male issue in the life-time of the testator. The testator,

(1) (1874) L. R. 7 H. L. 388 (403)

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a man considerably over 70 years of age and paralytic, could never have contemplated the death of one of the sons in his life-time. If that was what he intended he could have said so. But it was not necessary for him to say so, for had Shambhuprasad died in his life-time the testator could have made another will. The construction put by the High Court on the will added the words "during my life" after "should either of these sons die". The appellant's case depends on the natural construction of what the will says in clause 9, and would interpret those words to mean "die at any time". Neither the Succession Act (X of 1865) nor the Hindu Wills Act (XXI of 1870) applies to the present case as they are only in force in the Presidency Towns. The case, therefore, must be decided by the ordinary law as to the construction of wills, taking into consideration the natural wishes of a Hindu testator, whose great desire would be that the property should remain in his own family, an object which the High Court's construction would defeat. Mayne's Hindu Law, 7th edition, page 560, paragraphs 419—421; and *Radha Prasad Mullick* v *Ranee Mani Dassee*[1]. The gift over in clause 9 of the will was, it was submitted, good and the appellant was under it entitled to the share of the testator's property which Shambhuprasad took under the will. Reference was made to *O'Mahoney* v. *Burdett*[2] per Lord Hatherley, L. C., and in which Lord Cairns said "I am unable to find, in any case prior to *Edwards* v. *Edwards*[3], any authority that the words introducing a gift over in case of the death unmarried or without children of a previous taker do not indicate, according to their natural and proper meaning, death unmarried or without children occurring at any time, or that this

(1) (1908) 35 Cal. 896 (902): L. R. 35 I. A. 118 (128).

(2) (1874) L. R. 7 H. L. 388 (398 403)

(3) (1852) 15 Beav. 357.

ordinary and literal meaning is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper." *Edwards* v. *Edwards*[1] and *Ingram* v. *Soutten*[2] were referred to; and on the construction of Hindu wills, Mayne's Hindu Law, 7th edition, page 829, paragraph 614; *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[3]; and *Bhagabati Barmanya* v. *Kalicharan Singh*[4] were cited to show the expressions which have been held to create an estate of the kind intended in this will.

Lowndes for the respondent contended that on the true construction of the will Shambhuprasad took, at the death of the testator, an absolute interest in the share of the property bequeathed to him by the will; and that, if clause 9 was intended to apply to the death of either of the sons at any time after the period of distribution of the property, it was bad in law as an attempt to prescribe a special method of devolution of property which was the subject of an absolute gift. Although the Hindu Wills Act did not apply in the mofussil of India, the principle of section 111 of the Succession Act, which was one that under the Hindu Wills Act was applicable to Hindus in the Presidency Towns, should be followed: it should govern the case as a matter of convenience and because the greater part of India is governed by its principle in such matters. That would be a better mode of deciding the case than looking at what the intention of the testator was and how he was influenced by circumstances. To decide the case on some principle like section 111 of the Succession Act was better than to decide it as the Subordinate Judge has done without any such rule, but

(1) (1852) 15 Beav. 357.

(2) (1874) L. R. 7 H. L. 408.

(3) (1862) 9 Moo. I. A. 123, 139.

(4) (1911) 38 Cal. 468, 474; L. R. 38 I. A. 54 (64, 65).

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as governed by the case of *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[1], which is clearly distinguishable from the present case. To construe one document by looking at another was condemned by this Board in *Norendra Nath Sircar* v. *Kamalbasini Dasi*[2]. Here the period of distribution was the death of the testator. Survivorship at a subsequent date was not intended. The object of the testator was that the family of his eldest son Surajlal should not take any of the property in any event, and that no one person was to take it absolutely. Dhirajlal would have come in and taken the property if one of the sons had died during the life-time of the testator. It was strange that the testator did not provide for the death of both his sons instead of for the death of only one of them. Clause 9 of the will must refer to the survivorship of the testator and not to the survivorship of the sons under it. If the idea was to exclude Dhirajlal there is no provision as to what would happen on the death of both Chunilal and Shambhuprasad. "These circumstances" in clause 9 mean the death of one of them before and not after the testator's death. In the Bombay Presidency the daughter's is a favoured class by the custom of the country. See Mayne's Hindu Law, page 829; and *Lallubhai Bapubhai* v. *Mankuvarbai*[3]: the daughter is a "gotraj sapinda" and becomes a stock of descent. There is no presumption in Bombay that a Hindu would keep out his daughter or granddaughter from inheritance. The will must be read as a whole and must refer to survivorship of the testator. Clause 9 could not in any event have been intended to apply to the moveable property stated in clause 7 to have been made over by the testator in his life-time to his

(1) (1857) 6 Moo. I. A. 526 and (1862) 9 Moo. I. A. 123.

(2) (1896) 23 Cal. 563: L. R. 23 I. A. 18.

(3) (1876) 2 Bom. 388.

two sons. It is unreasonable to suppose that the testator expected the property (such as ornaments, cash, shares, furniture and all the other details of his property with which he dealt in the will) should not vest absolutely in the donees. Vesting and distribution are simultaneous. The construction contended for by the appellant would have been proper if clause 9 had dealt with a particular property. If the testator had wanted to tie up the property he would have appointed a trustee, or at least have put a prohibition on its being parted with. What the will gives to the sons was not a life-estate; the testator says nothing about usufruct as he would have done if he had intended to give a life-estate. Then what was the conduct of the parties after the making of the will by the testator They treated the property as given absolutely. Shambhuprasad sold one house. Chunilal alienated his share. It was submitted that the testator intended his sons to take an absolute estate, and he desired to find a mode of succession to this absolute gift. If the whole property is subject to clause 9, the judgment of Lord Hatherley in *O'Mahoney* v. *Burdett*[1] was applicable and was relied on for the respondent. The testator gave an absolute estate and then added on a term of devolution which he could not do. Reference was made to *Skinner* v. *Naunihal Singh*[2] and *Surajmani* v. *Rabi Nath Ojha*[3] as to the meaning of "owners and heirs". The latter word the testator uses at the beginning and end of his will, and it is equivalent to "malik" which implies an absolute estate given.

It was also contended that under section 42 of the Specific Relief Act (I of 1877) the appellant was not entitled to sue for a declaration without also suing for the property.

(1) (1874) L. R. 7 H. L. 388, 403. (2) (1913) 35 All. 211: L. R. 40 I. A. 105.

(3) (1907) 30 All. 84: L. R. 35 I. A. 17.

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De Gruyther K.C. in reply :—The will was in Gujarati and written without legal advice. The testator knew nothing about English law or cases, nor the period of distribution and its effect. He did not know whether the property would vest in executors or not. He knew nothing about gifts over, contingent interests, etc. But he knew the general law of inheritance, and that on his death his sons and grandsons would succeed, and on the death of his sons the surviving brother and grandson. Also that on the death of sons the property would go first to the widow and then to the daughter absolutely. There was no distinction between moveable and immoveable property. A liberal construction should be given to deeds and wills of Hindus, and one not necessarily according to English law. Reference was made to *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[1]; *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[2]; *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*[3]; *Radha Prasad Mullick* v. *Ranee Mani Dassee*[4]; *Bhagabati Barmanya* v. *Kalicharan Singh*[5]; and Mayne's Hindu Law, 7th edition, page 573.

There were three ways of giving a legacy; and one of them is absolutely subject to defeasance: Jarman on Wills, 6th edition, page 1364; Williams on Executors, 10th edition, 1006 and 1209. The happening of a "gift over" does not prevent estate from vesting. A Hindu is competent to make a gift and a gift over: see *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[2]; *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry*[6]; *Kristo-*

(1) (1856) 6 Moo. I. A. 393, 411.

(2) (1857) 6 Moo. I. A. 526, 550.

(3) (1865) 10 Moo. I. A. 279, 308.

(4) (1908) 35 Cal. 896, 902: L. R. 35 I. A. 118, 128.

(5) (1911) 38 Cal. 468, 474: L. R. 38 I. A. 54 (64, 65).

(6) (1878) 4 Cal. 23, 27: L. R. 5 I. A. 138 (147)

romoni Dasi v. *Narendro Krishna Bahadur*[1]; and *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*[2]. The proper construction was the ordinary, natural, and grammatical meaning which implies the death of one of the sons "at any time". *O'Mahoney* v. *Burdett*[3] was cited. If that meaning is to be cut down, it could only be done by something in the will to that effect: any general expression of intention would not control the clear meaning. *Gurusami Pillai* v. *Sivakami Ammal*[4]; and *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*[2]. Under the Hindu Law of the Mayukha a nephew, son of a deceased brother, takes with surviving brothers; *Chandika Bakhsh* v. *Muna Kunwar*[5]. Events after his death were in the testator's mind. If Chunilal had died after the testator's death leaving a brother and Dhirajlal those two must have shared the property. The words used refer to an event to occur after the testator's death. Reference to Dhirajlal was not necessary. The words are wide enough to include other contingencies and should not control the natural meaning of the clause.

[*Lowndes* said he abandoned his contention as to section 111 of the Succession Act.] The subsequent conduct of the sons was consistent with their having life-estates. As to the moveable property did the interest in it pass to the sons? The test is who had the benefit of it. The sons did not. The testator had not parted with it; if he had he would have impoverished himself.

(1) (1888) 16 Cal 383 L. R. 16 I. A. 29, 39

(2) (1897) 24 Cal 834 (849) L. R. 24 I. A. 76, 90.

(3) (1874) L. R. 7 H. L. 388 (403)

(4) (1895) 18 Mad. 347 (358). L. R. 22 I. A. 119, 128.

(5) (1902) 24 All 273 (280) L. R. 29 I. A. 70 (74).

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1914, March 17th :—The judgment of their Lordships was delivered by

LORD SHAW :—This is an appeal from a decree of the High Court of Judicature at Bombay, dated the 20th July 1910, reversing a decree of the Court of the District Judge, Surat, dated the 27th August 1908, which had affirmed with modifications a decree of the Court of the First Class Subordinate Judge, Surat, dated the 4th February 1907.

The only question for determination in the appeal relates to the construction of a will dated the 20th August 1899, made by a Hindu named Parvatishankar Durgashankar. He was a resident of Surat in the Bombay Presidency: and it may be at once stated that it was admitted by both parties at their Lordships' Bar that the Hindu Wills Act, Chapter XXI, of the year 1870, did not apply to this case, which falls to be determined not by the law operative within the territories subject to the Lieutenant-Governor of Bengal or the local limits of the ordinary original civil jurisdiction of the High Courts at Madras and Bombay. It may well be that the sections of that Act upon interpretation would yield the same result as has been arrived at in the present case. But no decision on that topic is given: and the case is treated as one applying in the mofussil, and therefore to be dealt with on ordinary legal principles. It must also be stated that the various terms employed in the particular will are special, and that no general rule can be said to be precisely applicable in its construction except that the Court must make its best endeavour to extract the intention of the testator.

Parvatishankar, the testator, died on the 4th July 1901. He left surviving him two sons, Shambhuprasad (who died on the 2nd January 1903, leaving a widow, the respondent in this appeal, and a daughter) and Chunilal, the appellant. A third son of Parvatishankar, Surajlal, had predeceased his father, but had left

one son. Surajlal had separated from his father many years previous to his death; the other sons were in family with him.

The will was executed about two years before the testator's death and it purports to dispose of the whole of his property. By clause 2 he appointed his two sons executors, heirs and owners of the whole. In various other clauses details as to the immoveable property are given, and directions that his sons are to divide and take in equal shares the whole of it with certain exceptions. In clause 7, there is a declaration as follows:—

"As to the moveable property which I possessed, I have during my lifetime divided the same between my two sons, Shambhuprasad and Chunilal, according to my wishes and have made over the same in their possession."

A certain enumeration with directions is also given as to gold and silver ornaments in his possession. By clause 8 the testator gives each of his said two sons a half of his estate not specifically disposed of by his will.

It is clear up to this point in the will that the one predominant desire of the testator was that his two sons should have his property between them

It was in the course of the case, however, found in fact that he had not accomplished, or completely accomplished, this desire. And the will accordingly falls to be appealed to as the governing instrument in regard to the distribution.

The question of survivorship as between these two sons was not dealt with until clause 9 of the will was reached, and it is in the following terms:—

"I have divided between and given to my two sons Shambhuprasad and Chunilal the whole of my property as mentioned above But should either of these two sons die without having had (leaving) any male issue, the survivor of the said two sons is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue (behind him) after undertaking (to defray) the expenses in connection with the

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maintenance of his widow and the maintenance and marriage of his minor daughters. But under these circumstances the heirs of my deceased son Surajlal shall not get any right whatever."

Various issues were raised in the case, including whether the estate in question was self-acquired. This was answered in the affirmative, and that answer is not now disputed. As stated, the one question remaining in the case has reference to the construction of clause 9 above quoted. The learned Judges of the High Court of Bombay have held that—

"The period of distribution contemplated by the testator is clearly the period of his death, and under these circumstances the event which may interfere with that distribution and give rise to the necessity for other arrangements must be an event occurring prior to his death."

As already mentioned, Shambhuprasad survived the testator. And the result of the judgment is that one-half of the property now to be disposed of is held to have vested in him *a morte testatoris* and that the whole provision of clause 9 with reference to survivorship falls, in the events which have occurred, to the ground. The effect of the learned Judges' decree is that the clause must be read as if the survivorship there provided for was limited to survivorship as at the testator's death.

Their Lordships are clearly of opinion that this judgment cannot be maintained. There is nothing specifically either English or Indian in the idea that the will of a testator must be construed on that principle which would enable Courts of Law most fully to give effect to the intention expressed by his words. It may be that if the words he employs are *voces signatae* they must be so accepted, whatever the suspicion may be as to the testator having had that particular view of his own language. But in ordinary circumstances ordinary words must bear their ordinary construction, and the whole will, that is, the whole of the words employed by the testator, must be looked at together so as to determine

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his whole intention. Furthermore, it is not on this principle legitimate to take words which have a general *meaning and subject them to limitations* which the words do not necessarily imply. It may be true that there is a body of older cases which would warrant a suggestion that the term employed in this will, namely, "should either of these two sons die without having had (leaving) any male issue" should be limited to such death occurring before the death of the testator himself, but the will does not say that, and it has for many years been a settled principle that words of this class, being in general terms, must receive their full, and not a restricted, meaning.

The leading authority on the subject is, of course, *O'Mahoney* v. *Burdett*[1], and two sentences of Lord Hatherley's opinion may be here repeated. He refers to the duty of the Courts always to consider carefully the whole will,

"and, having regard to all the various clauses contained in it, to see what is the full and complete and perfect intention of the testator"

He corrects the case of *Edwards* v. *Edwards*[2], and makes the statement of the principle run thus:

"that the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions in the will which are inconsistent with that supposition"

If it did not appear presumptuous to say so, one might comment on the case of *O'Mahoney* v. *Burdett* as one which emerged through a thicket of technical decisions to a ground of plain and pre-eminent good sense. It was also, of course, fortified by authority, and notably by the case of *Allen* v. *Farthing*[3], the fullest report of which was given by Mr. Jarman in his work on "Wills". (6th edition, page 2160.)

(1) (1874) L. R. 7 H. L. 388, 404 (2) (1852) 15 Beav. 357.
(3) (1816) 2 Madd. 310.

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But so far from the language employed in the present will leaving any serious ambiguity as to the intention of the testator, their Lordships are of the opposite opinion. In their view the words clearly point to survivorship whenever it should occur. When Shambhuprasad, having, with his brother Chunilal, survived his father, died, leaving a widow and a daughter, the language employed to cover such a situation seems exact and clear.

"Should either of these two sons," it says, "die without having had (leaving) any male issue, the survivor . . is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue."

And, as if this were not sufficient, the will proceeds to lay upon the surviving brother a duty in the event of that survivorship in the following language:

"after undertaking (to defray) the expenses in connection with the maintenance of his widow and the maintenance and marriage of his minor daughters."

It seems to their Lordships that it would be a strained construction of a will in that form (which manifestly contemplates death occurring at any time—with the receipt of property by way of survivorship—on the one hand, and the duties to be laid upon the survivor at any time, on the other hand) to say that the whole of these provisions fall to the ground, although Shambhuprasad had in point of fact left no male issue, because he did not die in that situation before the testator himself. The testator, in their Lordships' opinion, had clearly in view a much wider and more general provision, and they think that the events which have in fact occurred, *viz.*, the survival of the testator by his two sons and the death of one of these sons leaving a widow and daughter but no male issue, are events to which the will has operative application. They accordingly do not doubt that Chunilal, the surviving son, is, as such survivor, entitled to the estate conveyed by this clause,

and that the correlative obligation resting upon him comes into play.

Their Lordships desire to put on record an admission made by Counsel for the appellant to the effect that he had no knowledge of any property of the deceased testator in possession of the respondent, Shambhuprasad's widow, and that, if the respondent came into possession of such property under arrangements made in the life-time of her husband with his brother the appellant, the present judgment would not be used to disturb such an arrangement.

Their Lordships do not feel themselves able to give effect to the argument presented under section 42 of the Specific Relief Act or to interfere with the judgment of the Subordinate Judge on this question of procedure.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the cause be remitted to the High Court in order that upon provision being made and security being given to its satisfaction for the maintenance of the respondent and for the maintenance and marriage expenses of the minor daughter a declaration and injunction be given in terms of the plaint. In view of the special difficulties in the construction of the will the appellant will pay to the respondent all costs incurred by her before this Board and in the Courts below.

Solicitor for the appellant: *Edward Dalgado.*

Solicitors for the respondent: *T. L. Wilson & Co*

Appeal allowed.

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1914. *January 6.*

NARAYAN PURUSHOTTAM GARGOTE (ORIGINAL PLAINTIFF), APPLICANT, *v.* LAXMIBAI HUSBAND DATTO BHAGWAN AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.*

Civil Procedure Code (Act V of 1908), Order XLVII, Rule 1—Review petition—Subsequent filing of appeal—Jurisdiction of Court to hear review petition is not taken away by appeal subsequently filed—Practice.

An application for review of judgment was filed in a District Court and a rule *nisi* was granted. The party subsequently filed an appeal in the High Court. The District Court rejected the review application on the ground that it could not proceed with the application as an appeal was already filed. The applicant having applied to the High Court:—

Held, setting aside the order and directing the District Court to dispose of the application on the merits, that there was no express provision in the Civil Procedure Code which rendered the application for review incompetent on the mere presentation of an appeal by the same party at any subsequent time.

Chenna Reddi v. Peddaobi Reddi[1], followed.

THIS was an application under extraordinary jurisdiction from an order passed by E. Clements, District Judge of Satara.

The District Judge of Satara decided an appeal against the plaintiff in the case. The plaintiff filed an application for review on the 10th October 1912 and a rule *nisi* was granted on the 12th idem.

On the 14th October 1912, the plaintiff also filed an appeal in the High Court; but applied to keep the appeal pending till the review application was decided.

The District Judge holding that his jurisdiction to hear the application was taken away by the appeal subsequently filed dismissed it on the following grounds:—

A preliminary objection is urged that the appellant having preferred an appeal to the High Court, this Court cannot proceed with the application.

* Civil Application No. 92 of 1913 under extraordinary jurisdiction.

(1) (1909) 32 Mad. 416.

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A second objection is urged that this application is bad for want of a certified copy of the decree.

The appellant relies upon the Madras Full Bench case of *Chenna Reddi* v. *Peddaobi Reddi*[1] in which the proposition is laid down that when in a suit a review application is presented by a party and an appeal is afterwards preferred, the Court to which the application for review was made is not thereby deprived of jurisdiction to entertain the application I think that that case is distinguishable from the present because here the applicant for review has himself elected to appeal from the decree It will be seen that in asking themselves whether the Code by necessary implication withdraw the jurisdiction to hear the review application, the High Court did not examine particularly the case in which the same party asks for a review and also appeals I think that the wording of Order XLVII, Rule 1, sub-section 2, necessarily implies that a party should not be allowed to prosecute an application for review as well as an appeal It would be an absurdity to allow the obvious intention of the rule to be defeated by the artifice of presenting the review application first and the appeal the day after The 2nd sub-section to Rule 1 allows a party who is not appealing the privilege of applying for a review notwithstanding the pendency of an appeal by another party except where the ground of each appeal is common to him and the appellants, or where as respondent he can present to the appellate Court the case on which he applies for a review The words "who is not appealing" would by ordinary usage mean "who has not taken any steps towards appealing"; such for an instance as applying for certified copies By implication a party is not entitled to prosecute an appeal as well as an application for review

The application was admitted provisionally without a copy of the decree on the strength of the ruling contained in I L R 17 All 213 It is however pointed out that that ruling goes no further than to support the practice of the Allahabad Court In this Court the practice is to require a copy of the decree and that practice is inconsistent with both the Civil Procedure Code and the inference to be drawn from the wording of the Limitation Act, section 12 I think both objections taken to this application are valid and reject it with costs.

The plaintiff applied to the High Court

Jayakar, with *S. Y. Abhyankar*, for the applicant.

P. D. Bhide, for opponent No. 1.

V. V. Bhadkamkar, for opponent No. 2.

Jayakar:—The Legislature intends in clause 1 to Rule 1 of Order XLVII to bar the review only when an

[1] (1909) 32 Mad 416

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appeal has already been preferred. The rule does not prevent a party who has applied for review from appealing against the decree: see *Bharat Chandra Mazumdar* v. *Ramgunga Sen*[1]; *Nistarini Dasi* v. *Kazim Ali*[2]; *Kanhaiya Lal* v. *Baldeo Prasad*[3]; *Chenna Reddi* v. *Peddaobi Reddi*[4].

Bhide :—A party cannot seek to review a decree and at the same time appeal from it: see *Pandu* v. *Devji*[5]: *Ramanadhan Chetti* v. *Narayanan Chetty*[6].

SHAH, J. .—This application arises under the following circumstances:—

The District Court of Satara having decided Appeals Nos. 67 and 70 of 1911 on its file against the plaintiff, he presented an application for review to that Court on the 10th October 1912. A rule *nisi* was granted on the 12th October; and on the 14th of October he filed a second appeal in this Court against the decree of the lower appellate Court. He also informed the Registrar, while filing the appeal, that he wanted the appeal to be kept pending until his review application to the lower appellate Court was disposed of.

The District Court has rejected the review application on two preliminary grounds without going into the merits of the application. One of the grounds is that certain copies which ought to have been filed with the application were not filed, and that the application could not, therefore, be entertained. Without expressing any opinion as to whether it was necessary to file those certified copies with the application, I am clearly of opinion that when the Court admitted the application on the 12th of October with full knowledge of the fact that the copies were not filed along with the application

(1) (1866) Ben. L. R. F. B. 362
(2) (1910) 12 Cal. L. J. 65
(3) (1905) 28 All. 240
(4) (1909) 32 Mad. 416
(5) (1883) 7 Bom. 287 at p. 288.
(6) (1901) 27 Mad. 602.

the omission was sufficiently condoned. It would not therefore be right to disallow the application on that ground.

The second ground, which has been the main contention between the parties on this application, is that the applicant having preferred an appeal to this Court, the lower Court had no jurisdiction to proceed with the application for review. This point has been fully argued before us and several cases have been cited. I do not propose, however, to discuss the cases in detail. It is common ground that at the date of the presentation the application was in order and that the lower Court had jurisdiction to entertain it. It is argued, however, that that jurisdiction came to an end as soon as the plaintiff preferred a second appeal to this Court. The only decision which covers this point is the case of *Chenna Reddi* v. *Peddaobi Reddi*[1]. On a full consideration of the arguments on either side of the question, I have come to the conclusion that this Full Bench decision should be followed. Accepting that view it is clear that the learned District Judge was not right in rejecting the application on the preliminary ground raised by the defendants There is no decision cited to us except the case of *Ramanadhan Chetti* v. *Narayanan Chetty*[2] (which in terms has been overruled by the decision in *Chenna Reddi's* case) that can be said to be in any way inconsistent with the view taken by the Madras High Court. In a matter of this kind, I think, it is desirable that the practice of different High Courts should be uniform as far as possible, and I see no reason whatever to think that the practice in this Presidency has been in fact different or that it ought to be different. Apart from the decided cases I think on a fair reading of the provisions of the Civil Procedure Code relating to this

(1) (1909) 32 Mad. 416. (2) (1904) 27 Mad 602.

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point, it is clear that an application for review can be made before any appeal is filed by the party and I know of no reason why an application, which was perfectly competent at the date of the presentation, should not be disposed of on the merits. There certainly is no express provision in the Code which renders the application incompetent on the mere presentation of an appeal by the same party at any subsequent time. In my opinion there is no practical inconvenience so long as the appeal is not prosecuted during the pendency of the review application. The present case fairly illustrates that it is only by following the practice, which has been sanctioned by the Madras High Court, that the remedy by way of review can be secured to the aggrieved party in an appropriate case, without requiring him to jeopardize his right of second appeal.

On these grounds the rule should be made absolute and the lower Court directed to dispose of the application on the merits.

Costs throughout to be costs in the application.

HEATON, J. —I concur in the order proposed. It does not seem to me that this matter involves any really important legal principle or that for practical purposes it is anything more than a matter of practice. The practice, which, as I understand, at present is followed, is that which was followed by the applicant in this case. He applied for a review first and afterwards he appealed. Regarding this, as a matter of practice, I can see nothing in it to object to, nothing that is in any way inconvenient to, or inconsistent with, the proper, ordinary administration of justice. Therefore I see no reason to press my own view of the meaning of Rule 1 of Order XLVII.

I should only like to add this: that I think there is great force in the reasoning of the District Judge. Personally also I am not at all satisfied that the conclu-

sion reached by the Full Bench of the Madras High Court in the case of *Chenna Reddi* v. *Peddaobi Reddi*[1] is really correct. But for the reasons I have stated, I consider my own personal opinion in these matters as of no particular importance. Therefore I concur in the order which my learned colleague has proposed.

Rule made absolute.

R. R.

[1] (1909) 32 Mad. 416.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

GANGAPPA REVANSHIDAPPA HUNDEKAR, APPLICANT, v. GANGAPPA MALLESHAPPA HUNDEKAR AND OTHERS, OPPONENTS.*

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January 19.

Leave to appeal to Privy Council—Final order—Interlocutory order—Order rejecting an application for bringing on record the legal representatives of a deceased party to a pending appeal—Amended Letters Patent, clause 39—Civil Procedure Code (Act V of 1908), sections 109, 110.

The applicant, claiming to be the legal representative of a deceased party to a pending appeal, applied to have his name brought on the record. The High Court disallowed the application and ordered the names of the heirs of the deceased to be substituted. The applicant applied for leave to appeal to His Majesty in Council from the order rejecting the application:—

Held, that the order having been passed on an application in a pending appeal, was not a final, but an interlocutory order, and that no appeal lay from it to His Majesty in Council under the provisions of clause 39 of the Amended Letters Patent.

THIS was an application for leave to appeal to His Majesty in Council.

One Gangappa Rudrappa obtained a decree against Chanbasawa on the 12th February 1909, declaring that he was the adopted son of Rudrappa, the deceased husband of Chanbasawa. She appealed to the High Court; and adopted one Virupakshappa on the 12th May 1909. Virupakshappa applied to the High Court on the 7th

* Civil Application No. 545 of 1913.

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August 1909 to be joined as a co-appellant with Chanbasawa. The application was granted on the 13th idem. Chanbasawa died on the 15th October 1910; and Virupakshappa died on the 3rd July 1912.

The applicant, Gangappa Revanshidappa, applied to the High Court to be brought on the record as the legal representative of Virupakshappa. He based his claim on a will alleged to have been made in his favour by Virupakshappa. The High Court sent down an issue to the lower Court to determine the factum and validity of the alleged will. The finding was duly certified. The High Court held that the will was not proved; and rejected the applicant's application on the 29th August 1913. On the same day, the High Court granted the application made by the natural heirs of Virupakshappa to be brought on the record as the legal representatives of Virupakshappa.

The applicant applied to obtain leave to appeal to His Majesty in Council from the order rejecting his application.

Nilkanth Atmaram, for the applicant :—I admit that I have no right to appeal under the Civil Procedure Code, as the order is not one passed on appeal. Still, I have a right to appeal under clause 39 of the Amended Letters Patent. Further, the order in question is not interlocutory but final; for the rejection of my application has absolutely debarred me from having anything to do with the appeal.

K. H. Kelkar, for opponent No. 1.

Setlur, with *G. S. Mulgaonkar*, for opponents Nos. 2 to 4 :—The present order is not appealable under clause 39 of the Letters Patent. It is not a final order and does not affect the merits of the case : see *Aben Sha Sabut Ali* v. *Cassirao Baba Saheb Holkar*[1].

[1] (1892) 6 Bom. 260

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SHAH, J. :—This is an application for leave to appeal to His Majesty in Council, arising under the following circumstances :—

A suit was brought by one Gangappa Rudrappa Hundekar in the Court of the First Class Subordinate Judge at Bijapur, substantially to have it declared that he was the adopted son of the deceased Rudrappa Hundekar against Chanbasawa *kom* Rudrappa and others. The suit was decided on the 12th February 1909 in favour of the plaintiff. Chanbasawa preferred Appeal No. 61 of 1909 to this Court against the decree in the said suit. On the 7th August 1909 an application was made by one Virupakshappa to be joined as a co-appellant with Chanbasawa and to continue the appeal with her alleging that he was adopted by Chanbasawa on the 12th May 1909 The application was granted on the 13th August 1909 subject to any objections the respondents might have to urge at the hearing. Chanbasawa is stated to have died about 15th October 1910; but apparently no application was made by anyone to be brought on the record as her legal representative. Virupakshappa died on the 3rd July 1912.

One Gangappa Revanshidappa Hundekar made an application (No. 547 of 1912) to this Court to be brought on the record as the legal representative of the deceased Virupakshappa. He claimed to be his legal representative on the strength of a will said to have been executed by Virupakshappa. An issue was sent down to the lower Court as to the factum and validity of the alleged will. The lower Court recorded the evidence and returned its finding to this Court. The application was then heard by us with the result that the will of Virupakshappa was held not proved. We accordingly rejected the application on the 29th August 1913. On the same day we granted the application of the natural heirs of Virupakshappa (Civil Application No. 572 of 1912) to

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be brought on the record as the legal representatives of Virupakshappa. The main appeal (No. 61 of 1909) is still pending in this Court.

The petitioner (Gangappa Revanshidappa Hundekar) now applies to this Court for leave to appeal to His Majesty in Council against the order dated 29th August 1913.

It is not disputed in this case that the value of the subject-matter of the suit and the value of the subject-matter on the proposed appeal is far in excess of rupees ten thousand. The order, which is sought to be appealed from, involves questions respecting property exceeding rupees ten thousand in value.

It is not suggested by the petitioner that there is any substantial question of law. But it is argued that as the order of this Court does not affirm any decision of the lower Court it is not necessary that the proposed appeal should involve any substantial question of law. So far I think the argument is good. In this case there is no decision of the lower Court which this order can be said to affirm The order is made on an application to this Court with which the lower Court would have nothing to do in the ordinary course. An issue was sent down to the lower Court apparently for the convenience of the parties to have the voluminous evidence recorded by that Court and a finding was called for. This finding or opinion is clearly not a decision of the lower Court within the meaning of section 110, Civil Procedure Code. Under Order XXII, Rule 5, read with section 107, Civil Procedure Code, it was the duty of this Court to determine the question. I am, therefore, of opinion that if the petitioner is otherwise entitled to appeal he has to satisfy only one condition under section 110, Civil Procedure Code, relating to the value of the property involved in the suit or the appeal and that the case fulfils that condition.

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The important question that remains to be considered is, whether the petitioner is otherwise entitled to appeal to His Majesty in Council. It is conceded by the learned pleader for the petitioner that the order complained of is not covered by section 109, Civil Procedure Code. It is clear that clauses (*b*) and (*c*) have no application and clause (*a*) does not apply, as the order is not passed *on appeal* at all. The appeal is still pending and no order is made thereon. This is only an order on an application in the appeal. But it is urged on behalf of the applicant that he has got a right to appeal to His Majesty in Council under clause 39 of the Amended Letters Patent. Under this clause any person may appeal to His Majesty in Council from any final judgment, decree or order of any Division Court from which an appeal shall not lie to this High Court under the provisions contained in the fifteenth clause of the Letters Patent. The order, no doubt, is an order of a Division Court from which there is no appeal to this Court under the fifteenth clause of the Letters Patent. The question, therefore, that remains to be considered is whether it is a final judgment or order within the meaning of clause 39. I think that this is not a final judgment or order as contemplated by the Letters Patent. It is an order made in a proceeding incidental to the appeal. It is an order which the Court can make under Order XXII of the Code of Civil Procedure for the purpose of ascertaining the legal representatives of the deceased Virupakshappa. The order does not affect the merits of the appeal, and it certainly does not decide any matter in dispute between the parties to the appeal.

A final judgment or order has been thus described in Halsbury's Laws of England, Volume 18, paragraph 490:—

"A judgment or order which determines the principal matter in question is termed 'final'. An order which does not deal with the final rights of the parties,

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but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure ; or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'. * * * * The decisions on the question whether an order is 'final' or 'interlocutory', therefore, must be grouped with reference to the particular purpose for which each was given"

If we apply this test in the present case—and I see no reason why it should not be applied—it is clear that the order in question is not final but interlocutory. It decides no matter in appeal. It is made before judgment in appeal and gives no final decision on the matters in dispute but is merely on a matter of procedure. Even Virupakshappa's status is not finally determined yet. He was brought on the record as a co-appellant in 1909. In consequence of his death having occurred before any adjudication of his rights, it became necessary to determine as to who should be allowed to occupy his place in the litigation for the purpose of continuing the appeal on his behalf. The matter in dispute between the parties would be obviously the matter in appeal and not in an incidental proceeding of this kind: see *Bozson* v. *Altrincham Urban District Council*[1]. The observations of Sargent, C. J., in *Aben Sha Sabit Ali* v. *Cassirao Baba Saheb Holkar*[2] lend support to the conclusion that the order in question is not "final".

It appears to me that the result of holding the order to be final within the meaning of clause 39 of the Letters Patent would be somewhat anomalous. If such a question had arisen during the pendency of the suit in the lower Court, and if an order, such as we have made, had been made by the trial Court, it is clear that no appeal could have been preferred against the order. This follows from the fact that no appeal is provided by Order XLIII, Rule 1, against such an order under Order XXII, Civil Procedure Code ; while, according to the petitioner's contention there could be an appeal to

(1) [1903] 1 K B 547.   (2) (1882) 6 Bom. 260

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His Majesty in Council, when such an order is made by the High Court in a proceeding in an appeal arising out of the same suit. I do not think that such an anomaly exists.

It is also clear that a judgment or order in order to be final within the meaning of clause 39 of the Letters Patent must finally determine the rights of the parties. In other words if it be not appealed from, the adjudication must be final. In the present case it is not denied that in spite of this order, the petitioner is entitled either to apply for the probate of the will or to enforce his rights under the will by a separate suit. The adjudication is not, therefore, final. It may be that the question of petitioner's right to represent the deceased Virupakshappa in this litigation is finally decided But that is a matter of procedure. So far as the substantial rights of the petitioner are concerned, it cannot be suggested that the adjudication is final.

For these reasons, I refuse to grant the certificate prayed for, and discharge the rule with costs.

HEATON, J. :—I concur.

Leave refused.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

KISHORBHAI REVADAS, EXECUTOR (ORIGINAL PLAINTIFF), APPELLANT, *v.* RANCHODIA DHULIA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.[*]

1914. *January 27.*

Evidence Act (I of 1872), sections 40, 41, 42 and 44—Probate and Administration Act (V of 1881), section 59—Will—Probate—Suit by the executor to recover possession and rent—Plea that the will was a fabrication and that probate had been obtained by fraud—Previous unsuccessful application by defendant to District Court to revoke probate on the same grounds, effect of—Jurisdiction of the Subordinate Judge to entertain the plea—Competency of the Probate Court, namely, the District Court.

An executor applied for the grant of probate and the Probate Court, namely, the District Court, made the grant Subsequently a nephew of the testator

[*] Second Appeal No. 110 of 1912

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made an application to the Court for the revocation of the probate on the ground that the will was a forgery and that he had been prepared to prove it in the probate proceeding, but at the last moment the executor had bought him off under a mutual arrangement, but after the order for probate had been made, the executor failed to perform his part of the arrangement and had thus committed a fraud both on the Court and the applicant. The application for revocation was disposed of by the Court on the ground that the applicant, on his own showing, was a party to a fraud upon the Court, that he had not come with clean hands and was not, therefore, entitled to the relief sought

Thereafter the executor having brought a suit in the Court of the Subordinate Judge to recover rent and possession against a tenant of the testator as defendant 1 and against the aforesaid nephew as defendant 2, defendant 1 pleaded that the deceased (testator) had asked him to pay rent to defendant 2 and defendant 2 contended as in the previous proceedings that the deceased had made no will, that the will produced was a fabrication and that probate had been obtained by fraud.

Held, that defendant 2 was barred by the decision of the District Court in the revocation proceeding from raising the same question in the Court of the Subordinate Judge.

Held, further, that it was the District Court which was competent to decide the question of fraud and collusion vitiating the decree of that Court under which probate had been granted and that as the Subordinate Judge who tried the suit had no jurisdiction in probate matters, the title of the plaintiff was conclusively proved on the production of probate and it was no valid defence for the defendants to allege that the will was a forgery and that probate had been obtained by fraud and deception.

Quære: whether a debtor of the estate could raise such a defence if sued by the executor in a Court having jurisdiction to revoke the probate?

SECOND appeal against the decision of Rutonji Mancherji, Judge of the Court of Small Causes at Ahmedabad with appellate powers, confirming the decree of M. J. Yajnik, Subordinate Judge of Umreth.

Suit to recover two fields from two defendants and Rs. 144 from both or any of them on account of damages for wrongful occupation and costs. The plaint alleged that the fields in suit belonged to one Jijibhai Kasandas who died after making a will dated the 13th July 1902, that the plaintiff who was an executor under the said will obtained a probate on the 11th August 1904, that

defendant 1 was a tenant of the testator for one year under a rent note but he did not vacate the land after the expiration of the period and that defendant 2, who was a nephew of the testator, prevented delivery of possession by defendant 1.

Defendant 1 denied the plaintiff's claim and answered *inter alia* that the plaintiff was not the *vahivatdar* of the deceased Jijibhai, that the deceased had during his last illness asked the defendant to pay rent to his nephew Jivabhai, defendant 2, that the deceased had not made a will as alleged and that the plaintiff had obtained the probate fraudulently; it was, therefore, invalid.

Defendant 2, Jivabhai Becharbhai, contended *inter alia* that he did not admit the claim, that the will relied on by the plaintiff was a got up one, that the deceased had during his illness told his tenants to pay to the defendant the rent due, that the plaintiff fraudulently obtained probate in the District Court, that the will having been sent to the Collector for registration as the District Registrar, he directed an inquiry in connection with it and the Mamlatdar made a report suggesting prosecution, that the plaintiff, thereupon, applied to the District Court for probate, that the defendant having opposed the grant of the probate, the plaintiff got some persons to intervene and promised to give back to the defendant the property of the deceased or its equivalent if the opposition to the application was withdrawn, that it was under these circumstances that the plaintiff obtained the probate which was, therefore, bad and legally ineffectual and that the plaintiff was, therefore, not entitled to recover possession and the rent claimed was excessive.

The Subordinate Judge found that in spite of the probate the plaintiff had not the right to recover

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possession and mesne profits as executor of Jijibhai as it was open to the defendants, to contest that the will, the basis of the probate, was not genuine and that the said will was a forged one. The Subordinate Judge, therefore, dismissed the suit relying mainly upon section 44 of the Evidence Act.

On appeal by the plaintiff the appellate Judge found that the first Court had both jurisdiction and power or authority to go behind the probate on the ground of fraud, that the will was a forged one and the plaintiff obtained its probate by means of fraud and collusion and that the plaintiff could not be permitted to take advantage of his own fraud and to recover possession. The appeal was, therefore, dismissed.

The plaintiff preferred a second appeal.

Jayakar with *B. F. Dastur* for the appellant (plaintiff) :—The probate of the will was granted to us under section 59 of the Probate and Administration Act. The grant is conclusive as to our representative title against the defendants. Defendant 2 was a party to the probate proceedings. Subsequently he applied to the District Court for the revocation of the probate on the ground that the will was a forgery and that the probate had been obtained by fraud practised on the Court and on himself, but his application was rejected. The judgment of the Probate Court operates as *res judicata*. It is a judgment *in rem* : section 41 of the Evidence Act, Taylor on Evidence, Vol. II, para. 1713 (10th Edn.), *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*[1].

The Court of the Subordinate Judge had no jurisdiction to decide the question of the genuineness or otherwise of the will. That jurisdiction is vested solely in the District Court.

(1) (1882) 6 Bom 703.

Section 44 of the Evidence Act lays down a rule as to the admissibility of evidence and refers to the method of proof. Although the language of the section is very wide, a person who is a party to the fraud cannot avail himself of the section and lead evidence to prove that the previous judgment of the Probate Court was obtained by fraud: *Venkatramanna* v. *Viramma*[1], *Chenvirappa* v. *Puttappa*[2], *Rangammal* v. *Venkatachari*[3], *Meadows and wife* v. *Duchess of Kingston*[4].

Defendant 1, the tenant, cannot raise the defence that the will was a forgery. Section 59 of the Probate Act gives an indemnity to a debtor paying a debt to the executor.

Patel with *M. N. Mehta* for the respondents (defendants):—Under section 44 of the Evidence Act, defendant 2, although a party to the probate proceedings, can show that the decision of the Probate Court was obtained by fraud. The language of the section is very general, the words being "any party to a suit" We rely on *Barkat-Un-Nissa* v. *Fazl Haq*[5], *Shama Charn Kundu* v. *Khettromoni Dasi*[6], *Rajib Panda* v. *Lakhan Sendh Mahapatra*[7].

The observations of Latham, J., in *Ahmedbhoy Hubibbhoy* v. *Vulleebhoy Cassumbhoy*[8] are *obiter dicta*. Civil Courts are not deprived of their jurisdiction to determine the question of fraud. In *Shedden* v. *Patrick*[9] Lord Brougham has observed, "When a judgment has been obtained by fraud, and more especially by the collusion of both parties—such judgment, although confirmed by the House of Lords, may, even in an inferior tribunal, be treated as a nullity."

(1) (1886) 10 Mad. 17.
(2) (1887) 11 Bom. 708.
(3) (1895) 18 Mad. 378.
(4) (1775) 2 Amb. 756 at p. 762.
(5) (1904) 26 All. 272.
(6) (1899) 27 Cal. 521.
(7) (1899) 27 Cal. 11.
(8) (1882) 6 Bom. 703.
(9) (1854) 1 Mac. Rep. 535 at p. 619.

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The application of defendant 2 for the revocation of probate was dismissed by the District Court on the ground that the defendant himself was a party to the fraud on the Court. There was no decision on the merits; therefore, there can be no bar of *res judicata*. Defendant 2 does not want to take advantage of his own fraud. He defends his title by showing plaintiff's fraud of which the plaintiff should not be allowed to take advantage.

Defendant 1, the tenant, is a stranger. He was not a party to the probate proceedings and he does not claim under defendant 2.

Jayakar in reply :—He relied on Field on Evidence, p. 188, and cited *Varadarajulu Naidu* v. *Srinivasulu Naidu*[1], *Monmohini Guha* v. *Banga Chandra Das*[2], *In re Pitamber Girdhar*[3], *De Metton* v. *De Mellon*[4].

SCOTT, C. J. :—This suit was instituted by Kishorbhai Revadas, the executor who had obtained probate of the will of Jijibhai Kasandas, to recover from the first defendant Rs. 144 as rent of certain fields occupied by him as yearly tenant, and possession of those fields.

The defence of the first defendant was that the deceased Jijibhai had asked him to pay the rent to his nephew Jivabhai, who was the second defendant in the case, and the second defendant Jivabhai contended that the deceased made no will, and that the will proved was a fabrication.

The second defendant prior to the institution of this suit on the 2nd of March 1905 made an application to the District Court for revocation of the probate granted to the plaintiff upon the ground that the will was a forgery, and that he (the second defendant) had been

(1) (1897) 20 Mad. 333 at p. 338.
(2) (1903) 31 Cal. 357.
(3) (1881) 5 Bom. 638.
(4) (1810) 2 Camp 420.

prepared to prove it in the probate proceedings, but at the last moment the plaintiff had bought him off, and that a mutual arrangement had been effected whereby the second defendant agreed not to cross-examine the plaintiff's witnesses and to call evidence, and thus facilitated the grant of probate to the plaintiff who would otherwise have been prosecuted for forgery on the strength of the Mamlatdar's report, and in consideration of the withdrawal of his opposition the plaintiff agreed to restore the property of the deceased to him (the second defendant), or to pay the equivalent in cash directly the probate had been granted, but after the order had been passed the plaintiff declined to carry out his part of the arrangement and thus committed a fraud on the one hand upon the Court, and on the other on him (the second defendant), and that, therefore, the probate should be revoked. The application for revocation was disposed of by the District Court on the ground that the second defendant on his own showing was a party to a fraud upon the Court, that he had not come with clean hands, and was not therefore entitled to the relief sought.

The first defendant, as I have stated, claims to be entitled to pay rent for the property to the second defendant. He, therefore, claims under him since the death of the testator. The second defendant in this suit has taken advantage of the first defendant claiming under him to put forward the same grounds as he put forward in the application for revocation, and the Subordinate Judge who tried the case in the first instance, and the Subordinate Judge with appellate powers who tried the case in appeal, having gone into the questions of fraud, which the District Court declined to entertain upon the revocation application, have found that the will was a forgery, and that the probate granted by the District Court is of no avail to

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enable the plaintiff to recover from the first defendant the property of the deceased.

This investigation was permitted in the lower Courts upon the strength of section 44 of the Evidence Act which states that: "Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

Now the party who seeks to prove the fraud and collusion vitiating the decree of the Probate Court, under which probate was granted to the plaintiff, is the second defendant, and the second defendant has already raised that question in the only Court which was competent to decide it, namely, the District Court, for the Subordinate Judges who tried the present case have no jurisdiction in probate matters, and the Court competent to decide it dismissed the application, for the reasons which I have already stated. It was an application in the nature of a suit, as all contested probate proceedings are, and the decision could have been appealed from by the second defendant, and if the learned District Judge was held to be wrong in rejecting the application upon the grounds upon which he had rejected it, the result would have been that those allegations of fraud would have been investigated by a Court competent to give effect to its findings. The second defendant, therefore, is, we think, barred by the decision of the District Court in the revocation matter from raising again the same question in the Court of the Subordinate Judge.

As regards the first defendant, he does not raise these questions by his pleading, although he has made common-cause with the second defendant in his

defence. As regards him, it is not disputed that he is in possession of property forming part of the estate of the deceased, and the plaintiff seeks to recover possession of that property for the estate as its representative. The defendant does not dispute that he is liable to pay rent for his occupation at a rate which is not exceeded in the demand in this suit.

Now, where the demand is made by the executor claiming title under an unrevoked probate, a debtor to the estate has no answer, unless possibly he is sued in a Court having jurisdiction to revoke the probate. What would have been the result of this common defence if it had been put forward in the District Court is a question which is not free from difficulty and which we have not to decide in the present case. But we think it is clear that in the Subordinate Judge's Court, which has no jurisdiction to deal with the question of probate, the title of the plaintiff was conclusively proved by the production of the probate, and it was no valid defence on the part of the first defendant to join in the allegation of the second defendant that the will was a forgery, and that the probate had been obtained by fraud and deception.

Section 59 of the Probate Act says that "Probate ... shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted." Therefore the first defendant in complying with the demands of the plaintiff would have been fully indemnified as against all persons entitled to share in the estate of the deceased.

The English cases afford illustrations of the rule stated in section 59 of the Probate Act. *Allen* v.

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Dundas[1] decides that: "Payment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null, and administration be granted to the intestate's next-of-kin. A probate, as long as it remains unrepealed, cannot be impeached in the temporal courts."

In *Attorney General* v. *Partington*[2] Mr. Justice Willes at page 204 says: "it is only necessary to bear in mind the nature of such a grant as the act of a Court of sole jurisdiction pronouncing as to personal property to the exclusion of all other Courts . . . upon the question of testacy and intestacy, and upon the right to receive and distribute the effects of the deceased in the event of intestacy, whether total or partial. Without the constat of such a Court no other Court can take notice of the rights of representations to personal property; and when such Court has by the grant of probate or letters of administration established the right, no other Court can permit it to be gainsayed." The last words of that quotation seem to us to be applicable to the case of a grant of probate by the District Court, which it is attempted to challenge in the Court of a Subordinate Judge. In *In re Ivory*[3] letters of administration of the estate of an intestate were granted *ex parte* to the defendant, as "his natural and lawful brother of the half blood." The plaintiff, who was an uncle of the intestate, then commenced an action in the Chancery Division for the administration of the estate, alleging that the defendant was illegitimate, and that he himself was next-of-kin; and moved for a receiver and an injunction. It was held by Lush, J., "that the application must be refused, for that as long as the letters of

(1) (1789) 3 Durn & E 125. (2) (1864) 3 H. & C. 193 at p. 204.
(3) (1878) 10 Ch. D. 372.

administration remained in force they were conclusive evidence that the defendant was one of the next-of-kin, and that the plaintiff's proper course of procedure was to apply in the Probate Division to have them recalled."

Whether a debtor of the deceased and one who holds property admittedly forming part of the estate would have any *locus standi* in applying to the District Court for revocation of the probate we need not decide. As regards the second defendant, although he had a *locus standi* to make an application, his right is now at an end by reason of the unsuccessful result of his application for revocation. That being so, it appears to us that the first defendant has no defence to this suit. He will be completely indemnified by paying and delivering over the property to the plaintiff, and it is a pity that under the circumstances he should have thought fit to make common-cause with the second defendant.

We reverse the decree of the lower Court and pass a decree for the sum claimed, and for possession of the property in suit against the first defendant, with costs throughout payable by both defendants.

Similar decree in F A No 109 of 1912. The decree will be against the two first defendants for payment and possession, and costs against all three defendants.

Decree reversed.

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Dundas[1] decides that: "Payment of money to an executor who has obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null, and administration be granted to the intestate's next-of-kin. A probate, as long as it remains unrepealed, cannot be impeached in the temporal courts."

In *Attorney General* v. *Partington*[2] Mr. Justice Willes at page 204 says: "it is only necessary to bear in mind the nature of such a grant as the act of a Court of sole jurisdiction pronouncing as to personal property to the exclusion of all other Courts . . . upon the question of testacy and intestacy, and upon the right to receive and distribute the effects of the deceased in the event of intestacy, whether total or partial. Without the constat of such a Court no other Court can take notice of the rights of representations to personal property; and when such Court has by the grant of probate or letters of administration established the right, no other Court can permit it to be gainsayed." The last words of that quotation seem to us to be applicable to the case of a grant of probate by the District Court, which it is attempted to challenge in the Court of a Subordinate Judge. In *In re Ivory*[3] letters of administration of the estate of an intestate were granted *ex parte* to the defendant, as "his natural and lawful brother of the half blood." The plaintiff, who was an uncle of the intestate, then commenced an action in the Chancery Division for the administration of the estate, alleging that the defendant was illegitimate, and that he himself was next-of-kin; and moved for a receiver and an injunction. It was held by Lush, J., "that the application must be refused, for that as long as the letters of

(1) (1789) 3 Durn. & E. 125. (2) (1864) 3 H. & C. 193 at p. 204.
(3) (1878) 10 Ch. D. 372.

administration remained in force they were conclusive evidence that the defendant was one of the next-of-kin, and that the plaintiff's proper course of procedure was to apply in the Probate Division to have them recalled."

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Whether a debtor of the deceased and one who holds property admittedly forming part of the estate would have any *locus standi* in applying to the District Court for revocation of the probate we need not decide. As regards the second defendant, although he had a *locus standi* to make an application, his right is now at an end by reason of the unsuccessful result of his application for revocation. That being so, it appears to us that the first defendant has no defence to this suit. He will be completely indemnified by paying and delivering over the property to the plaintiff, and it is a pity that under the circumstances he should have thought fit to make common-cause with the second defendant.

We reverse the decree of the lower Court and pass a decree for the sum claimed, and for possession of the property in suit against the first defendant, with costs throughout payable by both defendants.

Similar decree in F A No 109 of 1912 The decree will be against the two first defendants for payment and possession, and costs against all three defendants.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1914
February 24.

HARI ANNAJI DESHPANDE AND ANOTHER (ORIGINAL DEFENDANTS 1 AND 2), APPELLANTS, v. VASUDEV JANARDAN SATBHAI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 3 AND 4), RESPONDENTS.*

MAIBAI WIFE OF HARI ANNAJI (ORIGINAL PLAINTIFF 1), APPELLANT, v. BAGUBAI WIFE OF VITHALRAO DESHMUKH AND OTHERS (ORIGINAL PLAINTIFF 2 AND DEFENDANTS), RESPONDENTS.*

*Hindu Law—Mitakshara—Succession—Priority—Full sister—Son of a separated half-brother—Civil Procedure Code (Act V of 1908), section 11—*Res judicata *between co-defendants*

Under the Mitakshara, the son of a separated half-brother is entitled to succeed in preference to a full sister of the propositus.

Bhagwan v. *Warubai*(1), followed.

Per Shah, J:—In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a conflict of interests among the defendants, and that there was a judgment defining the real rights and obligations of the defendants *inter se*

Ramchandra Narayan v. *Narayan Mahadev*(2), followed

SECOND appeals from the decision of G. D. Madgavkar, District Judge of Ahmednagar, reversing the decree passed by M. K. Nadirshah, Joint Subordinate Judge at Ahmednagar.

Suit to recover possession of land.

One Martand owned the land in suit. He had two wives: by one wife he had one son Janardan; and by another wife he had three sons Ragho, Rangnath and Bhagwan, and three daughters Bagubai (plaintiff 2), Sitabai (defendant 4) and Maibai (plaintiff 1).

Janardan died in Martand's life-time, leaving a son him surviving, Vasudev (defendant 1). Martand died

* Second Appeals Nos. 705 and 706 of 1912
(1) (1908) 32 Bom. 300. (2) (1886) 11 Bom. 216.

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in 1891; and a week after, Ragho died. Rangnath died in 1892, leaving his widow Bhagirathi him surviving. Bhagwan died in 1899.

In 1904, Bhagirathi filed a suit (No. 51 of 1904) against Vasudev and the three sisters, Bagubai, Sitabai and Maibai, to recover her maintenance from them. The Court of first instance held that Vasudev was divided from Martand, and that the sisters were entitled to succeed to Bhagwan's property. The Court passed a decree against the three sisters and also against Vasudev on the ground that he was in possession of some of Bhagwan's property. Vasudev appealed against the decree, making only Bhagirathi a respondent. The appellate Court held that Vasudev was not liable as he was not in possession of Bhagwan's property.

In 1909, two of the sisters filed a suit against Vasudev to recover from him possession of Bhagwan's property. Vasudev also filed a suit against the sisters alleging that he was entitled to succeed to Bhagwan's property in their hands, as a preferential heir to Bhagwan.

The Subordinate Judge held that the question as to the priority to succeed to Bhagwan's property was *res judicata* by the decision in the first suit.

On appeal the District Judge held that the decision in the first suit was not *res judicata* in the present suit; and further held that Vasudev was entitled to succeed to Bhagwan's property in preference to Bhagwan's full sisters.

The parties appealed to the High Court.

K. H. Kelkar, for the appellants.

D. R. Patwardhan, for the respondents.

SHAH, J.:—Two points of law have been urged in these second appeals, firstly that a full sister is a nearer heir than a son of a separated half-brother according to

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Hindu Law, and secondly that the question of heirship is *res judicata* in favour of the sisters.

As regards the first point, the competition is between the full sisters of the deceased Bhagwan and the son of his separated half-brother. The parties are admittedly governed by the Mitakshara and not by the Mayukha. The sister has been recognised as an heir under the Mitakshara by this Court in several cases, and it is beyond dispute that she is an heir under the Mayukha. The dispute really is about the position to be given to her in the list of heirs according to the Mitakshara.

This identical question has been fully considered and decided in *Bhagwan* v. *Warubai*[1]. We are bound by this decision, and in spite of an attempt made by the learned pleader for the appellant to question its correctness, I see no reason to doubt it. All the texts and the decided cases bearing on this question have been subjected to a critical examination in *Bhagwan's* case and in the earlier case of *Mulji Purshotum* v. *Cursandas Natha*[2], which was a case under the Mayukha. It is needless to discuss them here over again.

While expressing my concurrence with the conclusion arrived at in *Bhagwan's* case, I shall briefly deal with the argument, which has been pressed on behalf of the appellant on this occasion. Mr. Kelkar for the appellant concedes, and it must be conceded, that the sister has not been mentioned as an heir at all in the Mitakshara. He does not press for Balambhatta's interpretation of the word *bhratarah* in Yajnavalkya's text, as this Court has refused to accept Ballambhatta's view, as it involves a complete departure from the order of succession accepted and advocated by Vijnaneshwara, and as it has been repudiated by Nilkantha in the Vyava-

(1) (1908) 32 Bom. 300. (2) (1900) 24 Bom. 563.

hara Mayukha. But it is strenuously argued that the sister has been recognised as an heir under the Mitakshara as understood in this Presidency, mainly on account of her having been expressly mentioned as an heir by Nilkantha, and that, therefore, under the Mitakshara she should be given the same position in the order of succession, as has been given to her under the Mayukha. It is argued that as she comes before the half-brother under the Mayukha, she must come in before the half-brother under the Mitakshara, *i.e.*, before the brother's son, as the brother's son comes after the half-brother according to Vijnaneshwara. In my opinion this is a wholly untenable position. It is practically impossible to assign to the sister the same relative position in the list of heirs under the Mitakshara as has been assigned to her under the Mayukha. Nilkantha gives her a distinct and definite position and brings her in after the grandmother and before the half-brother Vijnaneshwara, however, gives a much higher place to the half-brother in the order of succession, and in several respects his order of succession is different from that adopted by Nilkantha. It is, therefore, clear that the sister cannot be placed after the grandmother and before the half-brother or before the brother's son at the same time under the Mitakshara. In fact it is not reasonably possible to reconcile the Mitakshara and the Mayukha so far as the relative position of the sister in the compact series of heirs is concerned

There is a further difficulty in accepting the appellant's argument. It is not possible to place the sister before the half-brother without disturbing the compact series of heirs laid down by Vijnaneshwara. It is not right to disturb this compact series by introducing an heir who is not expressly mentioned by Vijnaneshwara. Lastly it was urged that the sister cannot be included

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among the *gotrajas* as understood by Vijnaneshwara and, therefore, she cannot be appropriately brought in anywhere unless she is placed before the half-brother. But I do not see any force in this argument, as Nilkantha in bringing the sister in after the grandmother says that she has all the qualifications of a *gotraja*. After all the sister has been recognised as an heir under the Mitakshara even though not mentioned by Vijnaneshwara, mainly because Nilkantha has expressly assigned her a high place in the list of heirs. There is nothing to render Nilkantha's view that she has the qualifications of a *gotraja* inapplicable to the Mitakshara.

Quite apart from the consideration, however, whether under the Mitakshara the sister can be included among the *gotrajas* or not, it is clear that the sister cannot be placed higher than the grandmother. It has been held in *Rudrapa* v. *Irava*[1] that she cannot be ranked any lower. The result, therefore, is that under the Mitakshara she comes next after the grandmother and *a fortiori* after the half-brother's *son*.

The second point relates to *res judicata*. In the previous litigation one Bhagirathibai widow of Rangnath was the plaintiff. She had filed a suit to recover the arrears of maintenance and the possession of a part of the family house for residence from Vasudev, the separated brother's son, and the three full sisters of Bhagwan. Vasudev, defendant No. 1, and one of the sisters, defendant No. 3, did not appear in the suit. The second sister, defendant No. 2, did not put in any written statement. The claim was contested by the third sister, defendant No. 4, on the ground that defendant No. 1 was in possession of the property. Though it was assumed by the trial Court in that case that the sisters—and not the nephew—would inherit Bhagwan's property, the question of

[1] (1903) 28 Bom. 82

heirship was *neither raised nor decided*. The present contesting parties were all arrayed as defendants in that suit. The defendant No. 1, Vasudev, appealed against the decree, and it is significant to find that the sisters, co-defendants, were not made parties to the appeal. The appellate Court passed a decree against the joint family estate of Martand without deciding any questions relating to the defendants *inter se*. It was made clear in the decree by the appellate Court that it would be open to defendants Nos. 2, 3 and 4 (*i. e.*, the sisters) to sue the first defendant in respect of *any alleged wrongful possession during* previous years. In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a conflict of interests among the defendants, and that there was a judgment defining the real rights and obligations of the defendants *inter se* (see *Ramchandra Narayan* v. *Narayan Mahadev*[1]). On looking at the judgments in the previous litigation, it does not appear that the point as to who was Bhagwan's heir was really raised by the parties. At any rate the point was certainly not decided. Under these circumstances it is clear that the question of heirship is not *res judicata*.

In my opinion both the points fail, and the decree of the lower appellate Court in each case is confirmed with costs.

HEATON, J. :—I am quite satisfied on a perusal of the judgment in and on a consideration of the circumstances of the previous litigation that there is no *res judicata* here. Further I am prepared to follow as an authority the case of *Bhagwan* v. *Warubai*[2]. In the obscurity which lies around these matters where the Mitakshara and Mayukha are in conflict, it seems to me that when

[1] (1886) 11 Bom. 216 [2] (1908) 32 Bom. 300

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a clear and definite decision has once been arrived at, that decision ought to be maintained and followed.

I therefore concur that both these appeals should be dismissed and the decrees of the lower appellate Court confirmed with costs.

Decrees confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

1914 *February* 24

KASHINATH RAMCHANDRA (ORIGINAL PLAINTIFF), APPELLANT, *v.* NATHOO KESHAV AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order II, Rule 2—Landlord and tenant—Lease—Landlord to recover possession on tenants' failure to pay rent—Suit by landlord to recover possession on tenants' failure—Decree directing plaintiff to recover possession on tenants' failure to pay rent within three months—Defendants' failure and recovery of possession by plaintiff—Prayer in the plaint for reservation of leave to bring a suit for rent not granted—Subsequent suit by the plaintiff to recover rent—Subsequent suit barred.

A lease provided that on the tenants' failure to pay rent the landlord should be entitled to take possession of the lands. The tenants having failed to pay the rent of two years, the landlord sued them and obtained a decree which directed that on the defendants' default to pay all the arrears of rent and costs within three months, the plaintiff should take possession of the lands. In the said suit the plaintiff had asked for permission to bring a separate suit for the rent in arrears for two years, but none was given. Subsequently the plaintiff having brought a suit for the said rent of two years,

Held, that the suit was barred under Order II, Rule 2 of the Civil Procedure Code (Act V of 1908) as the claim in the suit for rent up to the date of forfeiture arose upon the same contract as did the landlord's right of forfeiture for non-payment of rent; that no necessity or reason existed for a separate suit for rent where there had been a forfeiture for non-payment and that the claim for possession and the claim for rent ought to be enforced in one suit, provided the cause of action was the same, unless the Court should give leave for the reservation of one of the remedies.

* Second Appeal No. 566 of 1913.

SECOND appeal against the decision of N. B. Mujumdar, First Class Subordinate Judge of Dhulia with appellate powers, confirming the decree of D. T. Chaubal, Subordinate Judge of Yaval.

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Suit by a landlord to recover rent.

On the 3rd January 1907 the plaintiff let out his lands to the defendants for a period of ten years under a lease which provided that if the rent was not paid for any year the lands should be given back to the plaintiff. The defendants having failed to pay rent for two years, namely, 1907-08, 1908-09, the plaintiff brought the present suit to recover from the defendants Rs. 381-4-0 for the rent of the said two years The suit was filed in the year 1910.

The defendants contended *inter alia* that under Order II, Rule 2 of the Civil Procedure Code the suit was barred because the plaintiff had filed a suit, No. 983 of 1909, against the defendants for possession of the lands owing to their failure to pay the rent and obtained a decree, but in that suit he had not claimed the rent.

The plaintiff in his additional statement asserted that in his suit for possession on the ground of forfeiture he had expressly stated that he would bring a separate suit for rent and no question about rent having been raised in that suit, the present claim was not barred.

The Subordinate Judge upheld the defendants' contention and found that the claim for the rent of the two years in suit was barred under Order II, Rule 2 of the Civil Procedure Code. He, therefore, dismissed the suit.

On appeal by the plaintiff the appellate Judge confirmed the decree.

The plaintiff preferred a second appeal.

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P. B. Shingne for the appellant (plaintiff):—The cause of action for the suit for possession was entirely different from the cause of action for the present suit for profits. The liability to deliver possession and the liability to pay profits arose, no doubt, under one and the same lease, but in the former suit the cause of action was default in paying rent plus enforcement of the covenant as to delivery of possession; whereas in the present suit the cause of action is not so very complicated. The cause of action in the present suit is failure to pay rent or profits. A consideration of Order II, Rule 4 (*a*) and (*c*) would also show that the present case cannot be governed by Order II, Rule 2: *Lalessor Babui* v. *Janki Bib.*[1], *Tirupati* v. *Narasimha*[2], *Gutta Saramma* v. *Mayanti Raminedu*[3].

N. M. Samarth for the respondents (defendants):—This is not a suit for rent. It is rather a suit for mesne profits. Moreover, the cause of action in the present case is the same as the cause of action for the former suit. Both suits are based on one and the same lease. Order II, Rule 4, does not help the plaintiff. The cases relied on by the plaintiff have no bearing. The ruling in *Gutta Saramma* v. *Mayanti Raminedu*[3] was practically based on the decision in *Lalessor Babui* v. *Janki Bib.*[1] which was decided under the Code of 1882. The provisions of the present Code are different from those of the Code of 1882. In connection with the present case, see *Mussummat Chand Kour* v. *Partab Singh*[4], *Read* v. *Brown*[5], *Gledhill* v. *Hunter*[6], *Sheo Shunkur Sahoy* v. *Hridoy Narain*[7].

(1) (1891) 19 Cal. 615.
(2) (1887) 11 Mad. 210.
(3) (1903) 31 Mad. 405.
(4) (1888) L. R. 15 I. A. 156 at p. 158.
(5) (1888) 22 Q. B. D. 128.
(6) (1880) 14 Ch. D. 492 at p. 495.
(7) (1882) 9 Cal. 143.

SCOTT, C. J. :—The material facts are stated by the appellate Judge as follows :—

"The lease provided that on the defendants' failure to pay the rent the plaintiff should be entitled to take possession of the lands. Defendants having failed to pay the rent of the two years in question the plaintiff sued them in 1903 for possession and obtained a decree which directed that on the defendants' default to pay all the arrears of rent and costs within three months the plaintiff should take possession of the lands and recover his costs from them. See Exhibit 19. It is admitted that the defendants did not pay the rent and costs and that consequently the plaintiff took possession of the lands. In the said suit the plaintiff asked for permission to bring a separate suit for the rent of the two years in question but none was given to him. The question therefore is whether the present suit is barred under Civil Procedure Code, Order II Rule 2. I think it is clearly barred."

In our opinion the decision of the lower Court is correct. The claim in the present suit for rent up to the date of the forfeiture arises upon the same contract of tenancy as did the landlord's right of forfeiture for non-payment of rent.

The "cause of action" upon which the plaintiff may base various claims in one suit under Order II, Rule 2 does not depend upon the character of the relief for which he prays. "It refers . . to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour" *Mussummat Chand Kour* v. *Partab Singh*[1] "to every fact which it would be necessary for the plaintiff to prove . . . in order to support his right to the judgment of the Court": *Read* v. *Brown*[2]. If the evidence required to support two claims is different in any material respect the causes of action are different: see *Brunsden* v. *Humphrey*[3]. The Rule of the Supreme Court in England (adopted in Order II of the Civil Procedure Code) which prohibits with certain exceptions the union in one suit of other claims with a claim for the recovery of immoveable property is as pointed out by Sir George Jessel in *Gledhill* v. *Hunter*[4] a sur-

(1) (1888) L. R. 15 I. A. 156 at p. 158.

(2) (1888) 22 Q. B. D. 128.

(3) (1884) 14 Q. B. D. 141 at p. 147.

(4) (1880) 14 Ch. D. 492 at [illegible] 177—7.

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vival from the rule prevailing in ejectment actions modified by a limited application of the rule in Chancery that you might join in a suit to establish title to land any other cause of action so long as you did not make your bill open to objection on the ground of multifariousness Up to the time of the Judicature Act of 1873 the Common Law Courts entertained actions for rent upon the covenant in the lease after ejectment on the ground of forfeiture for non-payment of rent: see *Hartshorne* v. *Watson*[1] but no necessity or reason exists for a separate suit for rent where there has been a forfeiture for non-payment, under the practice established by the Judicature Acts and the Civil Procedure Codes. Both the claim for possession and the claim for rent may be enforced in one suit without any inconsistency. And since they may be enforced they ought to be enforced in one suit provided the cause of action is the same, unless the Court gives leave for the reservation of one of the remedies.

We agree with the criticism expressed by the Allahabad High Court in *Mewa Kuar* v. *Banarsi Prasad*[2] that the wording of sections 43 and 44 (now Order II, Rules 2 and 4) "is not happy and suggests confusion," which confusion does not appear to us to be diminished by the addition of clause (*c*) in Rule 4 We do not however think that the words of Rule 4 imply that in all cases a suit for the recovery of immoveable property must necessarily be based upon a different cause of action to a suit for arrears of rent for the same land. There may be cases in which a suit for recovery of land will involve the production of different evidence to that necessary to support a suit for rent in respect of the same land: for example a suit for rent up to the date of a forfeiture for breach of covenant to repair would depend upon different evidence to that necessary to

(1) (1838) 4 Bing. N. C. 178. (2) (1895) 17 All 533.

establish the breach of covenant and consequent right to possession. That however is not the case here.

The plaintiff apparently recognized that his claim for rent and his claim for possession arose out of one and the same cause of action but though in his plaint in the earlier suit he stated that he reserved his right to claim rent, he omitted to obtain the assent of the Court to the reservation. He is therefore barred by the express provisions of Order II, Rule 2, from now suing for the relief so omitted. We affirm the decree of the lower Court and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

JAN MAHOMED ABDULLA DATU AND ANOTHER, PLAINTIFFS v. DATU JAFFER AND OTHERS, DEFENDANTS.*

1913 August 28.

Khojas—Hindu law, how far applicable to Khojas—Joint family—Presumption as to membership of joint family—Mahomedan law—Spes successionis, transfer of—Family arrangement in the nature of a partition, reasonableness of—Limitation Act (IX of 1908), Articles 91 and 127.

In the year 1879 one D a Khoja was living at Malad in the Thana District, where he carried on a small business, together with *inter alia* his mother and unmarried daughter, his sons A and I and A's wife and A's son J. In that year it was agreed that A should separate from the rest of the family and should receive what was considered to be his share in the family property. The family property was valued at Rs. 4,500 and Rs. 900 or the fifth part of it was made over to A or the members of his family as his share, namely Rs. 400 in cash given to A, ornaments of the value of Rs. 200 given to A's wife and a house of the value of Rs. 300 settled on J. The terms of this transaction were contained in a deed of release dated the 13th of February 1879, by which deed A released all claims of himself and his wife and son against the family and family property.

* Suit No. 1021 of 1912.

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Subsequently I by himself or assisted by his father D continued to carry on business and acquired a considerable amount of property. After the release A lived in the house given by the release to his son J and some 12 or 13 years after the release another son was born to A, namely X. J and X at times lived with their grandfather D and their uncle I and received assistance from them in various ways, in particular their marriage and other ceremonies being performed from D's house and at his expense J and X were at times also employed by D and I in their business for wages. In the year 1902 D made a gift to I of his property at Malad reserving about Rs. 7,000 to himself.

J and X filed the present suit In their plaint they stated that the release of the 13th of February 1879 was not valid or binding as having been obtained by fraud, undue influence, etc, and also because it had not been acted upon They prayed *inter alia* for a declaration that the abovementioned business and properties were the properties and business of an undivided family, that the rights of the plaintiffs and defendants therein might be ascertained and declared, that the properties might be partitioned between the plaintiffs and defendants in accordance with their interests so ascertained and declared, that all necessary accounts might be taken, that a receiver might be appointed, that D and I might be restrained by injunction from alienating the properties, that it might be declared that the release of the 13th of February 1879 was not valid and binding on the plaintiffs and A and that it might be declared that the deed of gift of the 8th of October 1902 was void and of no effect as against the interests of the plaintiffs and other members of the joint family.

D and I filed written statements denying the allegations as to fraud, etc, and asserting that the release of the 13th of February 1879 had been acted on It was assumed in the pleadings that the parties were governed by the Hindu law of the joint family

Held that, as to the law governing Khojas the proper way to approach the question was as follows —

1 Where Mahomedans were concerned the invariable and general presumption was that they were governed by the Mahomedan law and usage and that it lay on a party setting up a custom in derogation of that law to prove it strictly

2. But that in matters of simple succession and inheritance it was to be taken as established that succession and inheritance among Khojas and Memons were governed by Hindu law "as applied to separate and self-acquired property"

Held, accordingly, that the plaint disclosed no cause of action at all unless the plaintiffs had alleged and were prepared to prove two or three salient features of the Hindu law of the joint family as customs adopted by the Khojas of Bombay as the question involved in the suit did not really arise on

a plea of simple succession and inheritance and that there had been no allegation of custom and no attempt had been made to prove a custom and in any case many of the prayers in the plaint were on the face of them bad as the plaintiffs could not have the declaration asked for as to the nature of the property and their rights therein nor sue for partition.

Held, further, that assuming this to have been a joint family under Hindu law when A passed the release of the 13th of February 1879 he went out of the family and purported to take out of it his wife and infant son, that the plaintiffs could not dispose of the release as void under Mahomedan law as the mere transfer of a *spes successionis* as under Mahomedan law the plaintiffs had no cause of action and that X, having been born after his father A had gone out of the family, from the point of view of members of the joint family did not exist.

Held, further, that it could not be inferred from the facts that their grand father and uncle had kept the plaintiffs, educated them and got them married, etc., that the plaintiffs thus became members of a joint family that what was to be looked at in estimating the reasonableness of such family arrangements as the release of the 13th of February 1879 (under Hindu law) was not the state of the family fortune on the day it was called in question but at the time it was made and that if there was then an adequate motive the Court would not scrutinize too closely the adequateness of the consideration

Ramdas v. Chabildas(1), applied

Semble, where the existence of a document if valid and binding on a party would defeat his suit to recover possession of any property he must sue under Article 91 of the Limitation Act for the cancellation of the document and that if he does not take steps in time to remove what else will be a bar to the success of his suit he cannot surmount that bar during the trial by exactly the attack he ought to have made on it directly and within the shorter period allowed by the law of limitation

Semble, Article 127 of the Limitation Act does not apply to Mahomedans as such or to Khojas and Memons except where the property is shown to have gone through one unimpaired descent and thereafter to have been held by the survivors as joint family property

Wasantrao v. Anandrao(2), considered

Semble, also, since no Khoja son can enforce a partition it follows that he cannot be a co-sharer

Ahmedbhoy Hubibbhoy v. Cassumbhoy Ahmedbhoy(3) and *Rani Sartaj Kuari v. Rani Deoraj Kuari*(4), considered

(1) (1910) 12 Bom. L. R. 621
(2) (1904) 6 Bom. L. R. 925
(3) (1889) 13 Bom. 534
(4) (1888) L. R. 15 I. A. 51.

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The facts of this case and the contentions of the parties are sufficiently set forth in the judgment of the Court.

Bhandarkar and *Vaidya* for the plaintiffs.

Mirza and *Khan* for 1st defendant.

Wadia, with him *Strangman*, for 2nd defendant.

B. Wadia and *Modi* for 3rd defendant.

C. A. V.

BEAMAN, J.:—In this suit the plaintiffs, who are the sons of Abdulla Datu, a Khoja, pray that it be declared that the properties mentioned in the plaint and the business referred to therein are the properties and business of a joint and undivided family. That the rights of the plaintiffs and the other defendants therein be ascertained and declared. That the said properties be partitioned between the plaintiffs and the defendants, in accordance with their interests so ascertained and declared. That for these purposes all necessary directions be given, enquiries made, and accounts taken. That in the meantime a receiver be appointed. That the defendants 1 and 2 be restrained by an order and injunction of this Court from alienating or otherwise disposing of the same. That it may be declared that the release referred to in the plaint is not valid and binding on the plaintiffs and defendant 3, or in the events that have happened it is inoperative against the plaintiffs and defendant 3 That the deed of gift dated 8th October 1902, in favour of the defendant 2, is void and of no effect as against the interests of the plaintiffs and the other members of the said joint family. And other, for the present immaterial, prayers.

The written statement of the defendant 1 sets up limitation, want of jurisdiction, and without prejudice to those defences pleads on the merits, adopting the written statement of the defendant 2, that the release was not

obtained by fraud, etc., but that it was a perfectly fair and valid transaction and has been acted on ever since. The defendant 2 in his written statement says that in or about 1878 the defendant 3 and plaintiff 1, who was then his only son, separated from the joint family. The separation was recorded in the release Exhibit 1 in this case. At that time the joint family only owned a small shop wherein groceries and cloth were retailed. In or about 1887 this defendant began to deal in those commodities on his own account The properties mentioned in Schedule A were all bought after the aforesaid partition, except a small house at Malad which came to the share of the defendant 1 on the partition, while the only other immoveable property of the family was allotted to the 1st plaintiff on the same Most of the said properties belong exclusively to this defendant. Denies that since the death of Jaffer and the partition in 1878 the defendant 3 or the plaintiff 1 lived with the 1st defendant or himself as members of a joint and undivided family or as such acquired any immoveable property or carried on any business. At the date of the said partition this defendant was a minor, and the family then owned no immoveable property in Bombay. Denies fraud, undue influence, etc. Denies that the plaintiffs and their mother Ratanbai were maintained out of the joint family property or continued to live as members of the joint family after the release Admits the performance of certain ceremonies but denies that the expenses were defrayed out of joint family funds. The release was acted upon and the defendant 3 is still living in the house given under it to the plaintiff 1. Denies that this defendant induced the defendant 1 to execute the deed of gift of 1902. Says that the defendant 3 and the plaintiff 1 have been living separate from the joint family ever since the release and have had nothing to do with the Bombay business and denies that the properties claimed were acquired by him for the joint

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family as *benamidar* but were his own self-acquisitions. Says that he employed the plaintiff 2 in his shop but had to get rid of him as he was useless. The plaintiffs then set on foot rumours that they were interested in the properties now claimed in consequence of which these defendants had to file the suit in the Thana Court. This defendant separated in estate from the defendant 1 in 1885 but has continued to live with him. Sets out his self-acquisitions. Pleads limitation. And want of jurisdiction.

A perusal of these pleadings is instructive as showing how deeply this community has, under the pressure of judicial decisions, become tinged with the peculiar notions of the Hindu law of the joint family. In order to understand at the outset what is substantially in controversy it may be well to state one or two of the salient facts.

For the purposes of this case the family may be taken to have consisted of the father Jaffer, his only son Datu, and his two sons, Abdulla defendant 3 and Ismail defendant 2.

Abdulla had one son plaintiff 1 Jan Mahomed at the date of the release dated 13th February 1879.

Some twelve or thirteen years later the 2nd plaintiff Aziz, said to be now about twenty, was born.

There can be no doubt, indeed this is not denied, that during the life-time of Jaffer there was a small nucleus of "joint family property" which on his death was taken jointly by the survivors. The amount of this nucleus is disputed, the defendant 3 swearing that it was about Rs. 10,000, while the defendants 1 and 2 would reduce it to something inconsiderable. But at the highest I do not think it could fairly be taken to have exceeded Rs. 4,500, the figure alleged to have been made the basis of the partition effected by the release of 13th

February 1879. The whole of that property was at Malad beyond the local limits of this Court's jurisdiction. But between 1880 and the date of the suit Ismail the defendant 2 either by himself or assisted by his father Datu, the defendant 1, has acquired a great deal of valuable property in Bombay. I was told in the course of the trial that this property was now probably worth a lac of rupees. It cannot be pretended, and it has hardly been seriously argued, that either of the plaintiffs or their father contributed in any way to this enlargement of the family fortunes. True the plaintiff 1 has vehemently contended that he worked from a very early age in his grandfather's business, but there is no reason to suppose that if he did his services were of any value. He is a feeble diseased man, who, according to his own letters, was never able to earn a penny when left to himself. Abdulla, the defendant 3, has been a confirmed drunkard and loafer since his early youth. He has sworn that he took to drink at the age of seven and admits he has never done any work at all since the partition or release. He has lived in the house given by that release to his eldest son, the plaintiff 1, upon a pittance of eight annas a day allowed him (I suppose for drink) by Datu and four annas a day given him by his mother, with daily rations of food. The 2nd plaintiff is only now about twenty years of age and certainly could not have been of the least service to the family as a producer. Such being the facts, it is clear, that apart from the special features of the law of the Hindu joint family, these plaintiffs have no shadow of moral right to share in the life's earnings or acquisitions of their uncle Ismail. Datu, the grandfather, is a very old man, stating his age to be eighty-six. In 1902 he made a gift of all his Malad property to his son Ismail, who was then the efficient representative of the family. By this deed of gift he appears to have reserved to himself some Rs. 7,000 and it has been argued that he

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did this designedly to provide adequate shares in the joint family estate, as he believed it to stand, for his son Abdulla and his grandsons the two plaintiffs. Assuming that that were so, though I do not believe that it was, it would indicate that Datu himself laid no claim at all to the valuable properties which Ismail claims to have acquired for himself in Bombay. Nevertheless if the doctrine of nucleus is to be applied, I think it would be extremely difficult for the defendant 2, in the face of his own pleadings, to escape its legal consequences.

Succinctly stated, that doctrine, originating in our Courts in the old case usually called the *Peshwa's case* appearing to have been decided by Mount Stuart Elphinstone, is that where there has been a nucleus of joint ancestral family property, all subsequent additions and acquisitions by any member of the family while still living in union with the rest immediately take the imprint of the nucleus, and are joint family property liable to be divided on a partition between all the then existing members of the joint family. In the present case, for example, since it is admitted that the family was joint (vide written statements) and that there was a nucleus of joint property, which became, on the death of Jaffer, ancestral joint family property, it follows that as Ismail has never separated from Datu, all his later earnings and acquisitions would be traced theoretically to the fund from which they grew, and would be joint family property liable to be divided between every member of the joint family now alive. It would be open to Ismail to prove, if he could, that notwithstanding the original nucleus his own acquisitions were made independently of it, and were therefore true self-acquisitions not liable to partition between the members of the joint family. But this is always difficult. Indeed where the person claiming to have made such self-acquisitions has nevertheless remained in all other respects a member of the joint family, living in

union or, as the phrase goes, joint-in food, worship and estate, it becomes, I think, virtually impossible for him to prove that he has acquired personal and separate wealth for himself not traceable to the "nucleus" root. The stock phrase just quoted appears peculiarly inappropriate to Mahomedans. A family may very well be joint in food, that is, the head of the family may keep an open table and give board and lodging not only to his sons and grandsons, which in accordance with oriental custom and the calls of natural affection every Mahomedan would probably do if he could afford it without the remotest intention of thereby giving any colour to claims which those who had thus enjoyed his hospitality might afterwards put forward to strip him of his wealth. But what could be meant by joint in worship? All Mahomedans are joint in worship, if they are good Mahomedans in a religious sense, although, as among members professing other great religions, there are to be found minor sects, and slight divergencies of ritual and dogma. Joint in estate begs the whole question. Mahomedans under their own law are never joint in estate, whether they live together or whether they do not. It is only when certain Mahomedan communities have been declared to be governed by the Hindu law, that the terms have any meaning. Living jointly in estate, then means no more than that if once they have formed a joint family, the members have not separated and partitioned the property, or possibly in the case of a single member desirous of withdrawing from the joint family without effecting a complete partition, he has not given a valid release of all his claims upon any share of the joint property. And I hope to show presently that judicial decisions have laid down sweeping propositions, which have had an extremely disastrous influence upon the flourishing and wealthy Khoja and Memon sects, and have gone far beyond any needed or hitherto known

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application of the rule that a proved special custom may override the general law. This case raises many interesting questions of far reaching importance. It would be easy to answer them all in the usual way by citing this or that authority; but I have felt in the course of the elaborate arguments addressed to me, particularly, after a careful study of all these authorities, that it is time, and this may be a fitting opportunity, to resume from the beginning the course of judicial decisions; to examine those decisions critically and ascertain, if possible, what is the precise law today governing Khojas, Memons and less important classes of Mahomedans, who by one or another judicial decision have been subjected to their own serious prejudice and detriment, in my opinion, to the Hindu law of the joint family. I want to follow closely, if I can, not only the decisions but the reasoning upon which they are based, which, commencing in 1847 and proceeding with variations to the present day, are supposed in this Court to have established the proposition that the law of the Hindu joint family in its entirety governs the Khojas and Memons of this Presidency. I feel the imperative need of some such complete and exhaustive critical analysis of the case law, first, because I am convinced that under existing conditions the strict application of the law of the Hindu joint family, with all its legal incidents (none of which as far as I can see can logically be discarded) to the commercial fortunes of these peoples, is a very great and ever growing hardship; second, because I doubt very much whether in spite of the glib manner in which cases involving such grave consequences are cited, and accepted as final, the learned Judges responsible for most of the important decisions have really given or meant to give the complete law of the Hindu joint family operation over the Khojas and Memons of Bombay. If it can be shown

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that certain propositions to be found in these judgments are really obiter, and have been much too broadly stated, the way will be prepared, if no more, to a reconsideration of the whole subject. That this is eminently desirable no one acquainted with the recurring litigation, rapidly increasing in volume attributable to this single cause, will be disposed to doubt. If, after all, the case law should be found to be inexpugnable, the Legislature must very soon step in to relieve these trading communities from the oppression of a system of law which does not properly belong to them, which was imposed upon them under totally different social conditions, and is utterly repugnant not only to their secular interests, but to their own law and religion. And here I will take the opportunity of quoting a passage from a judgment of my own in *Karsondas Dharamsey* v. *Gangabai*[1].

"The fundamental principle of the Hindu joint-family is the tie of sapindaship. Without that it is impossible to form a joint Hindu family. With it, as long as a family is living together, it is almost impossible not to form a joint Hindu family. It is the family relation, the sapinda relation, which distinguishes the joint family, and is of its very essence. The object of the early Hindu lawyers in clothing this family relation with special legal sanctions and far reaching consequences was quite clearly to preserve the continuity of the family and seems to harmonize completely with so much else that is peculiarly characteristic of the Hindu law and sentiment, similarly exemplified in caste restrictions and indicative of the deep interpenetration of law by religion. The first care of the Hindu law giver was to perpetuate religious observances, to perpetuate therefore the family, as a permanent unit of which each succeeding generation was under sacred obligations to perform religious obsequies for the benefit of ancestors. Obviously connected with this is the need of worldly provision and hence the legal attributes of joint-family property. There can be no alienation or delegation of spiritual duties. If the father could deprive his sons of the whole family property he might render them incapable of duly discharging his appointed obsequies so that where a father and sons held property together, the sons along with religious duties, acquired civil rights, and in the same manner their sons and sons and sons, to the uttermost limit of the sapinda tie. That is the theory of the joint Hindu

(1) (1908) 32 Bom. 479 at p. 493.

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family, and I have no doubt that until English lawyers took it in hand, introducing English notions often on an imperfect acquaintance with the Hindu system, that it was almost uniformly and consistently worked. I do not deny that there were probably always exceptions in favour of special self-acquisitions, but these were exceptions, and the general rule was that where father and sons had lived in "commensality" with property applied to the common uses, whether that property had or had not in the first instance been acquired by the father, it received the impress of joint-family property and fell under the law regulating its descent"

I quote that passage because I am still of opinion that it rightly states the theory of the Hindu joint family in its connexion with the law and points clearly to its essentially religious origin. But surely had that been not only fully realized but kept prominently in sight, it might have given pause to any Court about to decide, as upon a mere custom in a particular case, that this quite unique branch of the Hindu law, rooted in, and inseparably bound up with Hindu religion, could in its entirety be transferred to large bodies who were not Hindus, but had a law and a religion of their own, of a totally different and on the whole antagonistic character. It is true that this momentous change was brought about in the first place with special reference to the origin of the Khojas and Memons. These were originally Hindus, who were converted to Mahomedanism about five hundred years ago by the Pir Sadrudin. And Sir Erskine Perry, whose judgment I am about to deal with, was satisfied that notwithstanding the lapse of time since their conversion, these peoples had adhered to the Hindu law of the joint family. But I doubt whether this makes allowance enough for the intimate and inseparable interpenetration at all points of law and religion among Hindus and Mahomedans. It is possible, but *primâ facie* unlikely, that whole bodies of Mahomedans, neglecting the commands of their own law and the influence of their own religion, should adopt merely by way of custom, the entire complicated

and technical law of the Hindu joint family; but doing so could hardly be due, as Sir Erskine Perry appears to think, to inherited traditions, and a kind of religious atavism, nor after such adoption could any cogent reason be found to sustain the system On the contrary, as time went on and these Mahomedans gradually lost sight of their ancestry before conversion, the imperativeness of their own law and religion would certainly tend to dissipate rather than encourage any belated inclinations towards the old faith with its resultant laws that might have survived. Much more likely of course is the explanation that this assimilation is to be attributed to the pressure of surrounding Hinduism. But that is quite a distinct cause from that sought in these converts having been made from Hinduism. Any effects of that cause might reasonably be expected to have expended themselves and disappeared in, say, a century. It is, however, true that the preponderance of Hinduism, numerically at least, and its continuous pressure on other relatively small bodies enveloped by it, has shown itself to be more than once a *vera causa* of these later embedded alien elements assuming more or less completely, the general colour and character of the surrounding mass There can be no doubt, for instance, but that during the years of their weakness and dependence for very existence upon the tolerance of the larger peoples surrounding them, the Parsis became something very like a Hindu caste. On the other hand, in estimating the pressure of such forces it should not be forgotten that never has the tension and vigour of the Moslem faith as a whole been so relaxed or spent, in Asia at any rate, as to allow its adherent to succumb to the mere dead weight of surrounding numbers. And it certainly does seem antecedently improbable that converts, who are usually most zealous for their new faith, should, at a time when

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Mahomedanism was still aggressively predominant in India, have quietly lapsed back under the mere dead weight of Hindu environment, into, so far as all the practical side of life and business was concerned, their former Hinduism. Borrowing a custom from a neighbouring society is one thing; but the absorption of a complete group of legal notions in all their rigidity, rooted in and indissolubly bound up with an alien religion, and thus absorbed, regulating the largest part of life on its social and economic side, is surely quite another. There would be nothing very surprising in the Khojas and Memons having adopted the custom from Hinduism of allowing daughters on an intestacy no more than maintenance or dower; but it need not follow from that, even be the custom proved, that because that custom is consonant with the notions of the Hindu joint family and directly opposed to the Mahomedan law of succession, that those who had adopted it had at the same time voluntarily and consciously adopted along with it, every other legal incident of the Hindu joint family. And it may now be very confidently asserted that whether or not the Khojas and Memons of this Presidency had in 1847 adopted customs based on the law of the Hindu joint family, had those customs not been rather hastily, as I cannot help thinking, stereotyped by judicial decisions, they would long before this, with the expanding commercial prosperity and industrial enterprise of these peoples, have been utterly repudiated and abandoned. But a course of decisions beginning with *The Kojahs and Memons' case*[1], which I shall now examine, soon rivetted the fetters of the law of the Hindu joint family upon these and later other Mahomedan groups in this Presidency; so that it now remains to be seen whether it is possible to undo what has been done, and so relieve these progressive

(1) (1847) Perry O. C. 110.

and wealthy communities from what I believe is generally coming to be felt an intolerable burden. Take this comparatively small case as an example. But for the extension or supposed extension of the Hindu law to Khojas in all matters of property, succession and inheritance, no litigation of this kind would have been possible, nor would an energetic trader like the defendant 2, Ismail, have been put to the risk of being obliged to share his property, undoubtedly in fact whatever fanciful theories of law may be woven about it, the result of his own skill and industry, with a brother and nephews who can have no remotely conceivable moral or equitable right to a penny of it.

What Sir Erskine Perry had to try in *Hirbae* v. *Sonabae*[1] was a narrow question of an asserted custom amongst these sectaries. The plaintiffs claimed under the Mahomedan law (the authority of the *Quran*) their share of their father's estate. The defendant set up a custom of the Khojas by which daughters were entitled to no more than maintenance and dower. Exactly the same point was in controversy in the connected case. But it will be seen from the judgment that at that time the Memons occupied a better social position than the Khojas, and were already recognized as a flourishing and progressive community. Part of the reasoning then, contained in the first part of the judgment, is to be restricted entirely to the Khojas as they then presented themselves to the learned Chief Justice. Although the Khojas were described as generally poor, illiterate and ignorant of their own law and religion, a considerable sum must have been directly or indirectly at stake. The estate of Hadjibhai Mir Ali is stated to have been about three lacs of rupees. A custom, as yet *res integra*, was to be proved; yet it appears that all the evidence was recorded in two days. In that short

(1) (1847) Perry O. C. 110.

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time the learned Chief Justice says that a great deal of oral evidence fairly representing the views of the entire sect was taken. What a contrast between those days and these? Were such a suit to come up for trial in this High Court today it is safe to say that it would occupy months. And it certainly does seem surprising that within the compass of two days the Court should have been able to get evidence enough to satisfy itself upon so large and vital a question as that which was then determined. It is significant too that the learned Chief Justice very plainly thought that by affirming the alleged custom he was conferring a benefit upon the Khojas and Memons, and giving legal sanction to a venerated and highly prized usage. This is clear, I think, from that part of the judgment in which the question of how far the *lex loci* should be applied is elaborately and learnedly discussed. It is part of Fate's grim irony that what was meant to be so great a boon should have with the lapse of time turned out to be a grievous burden. In 1847 the Khojas collectively were a scattered ignorant sect, residing principally in Cutch, Kathiawar and Bombay, whose commercial activities had not extended much beyond retail business on a very small scale, and many of them dressed like the Hindus, one of whose customs they were interested at this time in upholding. But today the Khojas like the Memons are far from being illiterate, have made great strides in social and commercial development, and for their numbers are probably as rich and thriving an industrial community as any to be found in the Empire. There is probably not an intelligent leader, or fairly representative man in the whole sect, who would not be pleased to be relieved of this nightmare of the Hindu law of the joint family hanging over all his business activities. The case was different even then with the Memons, and Sir Erskine Perry notes that having

regard to the great amount indirectly at any rate involved in his decision it is likely that the decision of the Privy Council will be invited. It would not therefore be fair to criticize this judgment from a point of view suggested by the first part of it alone, or to doubt that it would have been or might have been different had the state of both Khojas and Memons in 1847 been what it is today. But I cannot too strongly insist upon the extremely restricted scope of the enquiry. It was restricted to one alleged custom and that alone, namely the custom of excluding females from any share in a paternal estate. As far as I can see, and I have read the whole judgment very carefully, and I may say with interest and admiration, the learned Chief Justice never meant to decide or supposed himself to be deciding anything more It was a custom which all that was influential and likely to be audible in the sect, was interested in affirming; those who pleaded against it for their rights under their own law were young defenceless women. Even today the Khojas and Memons would probably not object to the continuance of that custom standing alone. But parts of the learned Chief Justice's judgment, which are really no more than obiter, appear to pre-suppose as the ground of his decision a view that the Khojas and Memons had adopted not only this custom but the whole of the Hindu law to which it owes its origin. If the judgment be strictly analysed it will be found to go no further than this. (1) That a reasonable custom alleged and proved to have existed among a class, and not opposed to the written law of the ruling power (meaning here the English Statute Law), may be sanctioned by the Court. (2) That the words in the Charter of the Supreme Court "Law and usages of the Mahomedans" did not preclude a custom being legally recognized although it might conflict with the Divine law of the *Quran*.

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(3) That this particular custom was proved to exist among both Memons and Khojas. (4) That for the purposes of that case, the *lex lōci* must be subordinated to the personal law of the litigants and that old well established usage, not conflicting with any written law of the ruling power, was part of that personal law and ought to be enforced by the English Courts. I hope I may be permitted to say that Sir Erskine Perry's judgment in this case is one of which this High Court may well be proud. But it certainly does not go the length or anywhere near the length to which it appears to have been carried later.

The next case in chronological order is *Gangbai* v. *Tharar Mulla*[1]. This was a suit or petition by Gangbai (who must, I think, have been the same Gangbai, plaintiff *v.* Sonabai in the Khoja case just discussed) to have a charitable bequest contained in the will of Rahimatbai widow of Sajan Mir Ali set aside and to have her whole one-fourth of the residuary estate so bequeathed in charity, as the sole heir of Sajan Mir Ali. It is pretty clear from the form of the petition that whatever Sir Erskine Perry had decided or meant to decide in the *Kojahs and Memons' case*[2], neither the petitioner here, nor her legal advisers, nor the Court, understood that decision to have made the entire Hindu law of the joint family applicable to these Khojas. Else of course there could have been no question of the widow making a will at all. The point actually decided is quite unimportant but the case is interesting because it illustrates the almost hopeless confusion of thought, which prevailed at that time in the Court, over questions of Hindu and Mahomedan law. The judgment was delivered by Sir Matthew Sausse, who says: "It appears that Rahimatbai was a female of the Khoja caste, which, although Muhamadan in

(1) (1863) 1 Bom. H. C. R. 71. (2) (1847) Perry O. C. 110.

religion, has been held to have adopted, and to be governed by, Hindu customs and laws of inheritance." I pause here to observe first that the Khojas are not a caste. Sir Erskine Perry is careful to call them sectaries. The use of the word "caste" implies that they were rather Hindu than Mahomedan and goes a long way towards begging the crucial question. But what follows illustrates still better the extremely loose way in which law is made by judicial decisions. It certainly was not held, as I have just pointed out, that the Khojas and Memons had adopted Hindu customs and laws of inheritance generally. Not a word, I believe, will be found in Sir Erskine Perry's judgment to support the proposition that he held that the Khojas had adopted the Hindu law or laws of inheritance. What he did find was that a single particular custom, which belongs rather to the Hindu than the Mahomedan law, was proved to exist among Khojas and Memons. Later the learned Chief Justice says "Now represents the rights of the Khoja or Hindu heir-at-law." Again it is assumed without any evidence that Khoja and Hindu are interchangeable terms when prefixed to the words "heir-at-law", an assumption, it is submitted with respect, for which there is absolutely no foundation.

In 1853 *In the Goods of Mulbai*(1) was decided. It was held by Couch, C. J, that by the custom of Khojas, when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her blood relations but to the relations of her deceased husband. Here we come *in limine* upon another instance of that confusion of thought or loose use of language which hangs like a pall over this branch of the law. The actual point decided was that there was a custom proved amongst the Khojas (by the

(1) (1866) 2 Bom H C R 276 (2nd Edn.)

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evidence of three witnesses only as far as I can see) which entitled the husband's relatives to succeed to his widow's estate, if she died intestate, in preference to her own kin. What is remarkablei s that it appears to have been taken for granted in the statements of the witnesses quoted that a Khoja widow could will away the whole of her husband's estate, which is as inconsistent with the Hindu as with the Mahomedan law. The learned Chief Justice says (page 284): "I agree with the observations of the counsel for the caveator, that the law by which the Khojas are governed is not, properly speaking, Hindu law, but probably that law modified by their own peculiar customs; and I think it has been sufficiently established, that there is a Khoja custom which excludes the wife's relations from succeeding to property such as this." All the comment which such a passage requires is that it appears to assume that in the first instance Khojas would be governed by the Hindu rather than the Mahomedan law, and that it would lie on any Khoja so alleging to prove that the Hindu law had been modified by some Khoja custom. With great submission, that inverts the order of procedure. For surely in every case, except those in which a custom has already been legalized, it is to be presumed that the Khojas being Mahomedans are governed by the Mahomedan law until a contrary custom has been established.

In 1874 *Shivji Hasam* v. *Datu Mavji Khoja*[1] was decided, and it is from this time onward that the law becomes more definitely stereotyped. The case is commonly summarized thus: "In the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, inheritance, and succession among Khoja Muhammadans." It will be noted that if this correctly represents the

[1] (1874) 12 Bom. H. C. R. 281.

decision a great step has been made. Now, it is to be presumed that Khojas, although Mahomedans, are governed by the Hindu law in all matters relating to "property" as well as succession and inheritance. It, therefore, becomes necessary to examine this judgment with some closeness In the first part of the judgment devoted to the question, whether the property of the deceased had vested in the District Court, all that I need notice is that the learned Chief Justice Sir Michael Westropp speaks of Shivji as a "coparcener" and again as the manager of an undivided Hindu family. So far it appears to be taken for granted that the Khojas are governed by the Hindu law of the joint family, a proposition for which until this judgment there is absolutely no authority, I believe, to be found anywhere. The learned Chief Justice proceeds next to consider the contention that Khojas are not necessarily governed by the Hindu law of the Mitakshara. He refers to the *cause celebre* of *The Advocate General ex relatione Daya Muhammad* v. *Muhammad Husen Huseni*[1] decided in 1866 by Sir Joseph Arnould, but does not appear to deduce anything from it. He then goes on thus (page 291): "But in matters relating to property, succession, and inheritance, the Khojas appear to have retained to a considerable extent the Hindu law. In *Hirbae* v. *Sonabae*[2] they succeeded in showing that the Koran did not govern the order of succession amongst them.........(Then after setting forth the facts of that case and merely inferring from those facts that Sir Erskine Perry's decision went much further than in fact it did, he goes on—). The traditionary doctrine of the Supreme Court and of .the High Court has, for upwards of, at least, twenty-five years, been that, in the absence of proof of special usage to the contrary, the law applicable to Khojas is, in matters relating to

(1) (1866) 12 Bom H C R. 323 (note) (2) (1847) Perry O. C. 110.

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property, succession, and inheritance the Hindu law as administered in this Presidency. Accordingly, in *Gangbai* v. *Tharar Mulla*(1), we find Sir Matthew Sausse, C. J., saying that the Khoja caste, although Muhammadan in religion, has been held to have adopted and to be governed by Hindu customs and laws of inheritance." I pause here to repeat that, while undoubtedly Sir Matthew Sausse does say that, it is apparently a mistake, since I am unable to find any case in which anything nearly as wide as that ever was decided. "*In the Goods of Mulbai*(2), already mentioned, it was held that when a Khoja widow dies intestate and without issue, property acquired by her from her deceased husband descends to his relations, and not to those of the widow." I pause again to point out that my critical examination of that case shows that it does not pretend even to decide more than the narrow question before it, namely, which is first in succession to a Khoja widow holding her husband's property, her own or her husband's kin? and expressly leaves it in doubt, to what extent the Khojas are governed by the Hindu law in other matters of property, succession and inheritance. The learned Chief Justice goes on: "In a contest for administration in a case of intestacy, which has lately arisen between the mother and widow of a Khoja at the Ecclesiastical Side of the High Court, and, after occupying Sir Charles Sargent many days in hearing, now stands for judgment, the Ecclesiastical Registrar has collected several precedents at that side, —some being cases disposed of by the Court and others by the Ecclesiastical Registrar. In all, the Hindu law, as indicating the person entitled to succeed to the property, would seem to have been taken as the guide in granting letters of administration, except in one or two instances, in which the person so entitled expressly

(1) (1863) 1 Bom H. C. R 71. (2) (1866) 2 Bom. H. C. R 276 (2nd Edn.).

consented to the grant to another." This I take to be the real foundation of the decision for, as I have shown, the other cases cited so far certainly do not support it. But what is this ground? It is so vague that it can hardly be examined. But put at the highest it seems to be no more than this, that in intestacies on the Ecclesiastical Side, the Hindu law is followed in choosing the heir. Whether that practice be warranted or not, it is surely insufficient to be the basis of so wide a proposition as that the Khojas are governed by the Hindu law in all matters relating to "property, succession and inheritance".

The learned Chief Justice then cites the case of *In the Goods of Vallu Musani*, decided in 1855, where administration was granted by the Court to an undivided brother of the deceased in preference to his widow. I am unable to find that case, but I do not think it would throw much light on the problem I am trying to solve. For here again the entire question is begged when the brother is described as the "undivided" brother of the deceased. Upon these materials the learned Chief Justice concludes: "We think that we must consider it as the settled rule in Bombay that, in the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, inheritance, and succession amongst Khoja Muhammadans. There has not been any evidence that, in such a case as the present, there is in Bombay any usage amongst Khojas opposed to the Hindu law. And no evidence has been given to the effect that the ordinary rule in Bombay, *viz.*, that of the Hindu law, is not applicable to Khojas at Thana. We think, therefore, that we are bound to apply to them the Hindu law." In this way the conclusion is very summarily reached, a conclusion fraught with disastrous consequences to the Khoja community, that

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the Khojas are subject to the Hindu law in all matters relating to property, succession and inheritance. I have traced the process step by step from its innocent beginning to its completion in this judgment. No one who reads the cases critically can help admitting that from the first the learned Judges, responsible for these far reaching decisions, have enlarged Sir Erskine Perry's decision *per saltum*. It is easy to say that this or that has "been held" or that the "traditionary doctrine of the Supreme Court and the High Court" has been this or that. But examination shows that what is thus declared in general terms to have been held, never has in fact been held, and that the "traditionary doctrine of the Supreme Court and the High Court" *is a very unsound foundation for the* large conclusion based upon it.

In the Goods of Rahimbhai : Hirbai v. *Gorbai*[1] was decided by Sir Charles Sargent in 1875. It was here held that a mother was entitled, by the custom of the Khojas, to the management of the estate, and therefore to letters of administration in preference to a wife or sister. Here for the first time since 1847 we find in the opening passages of Sargent, J.'s judgment an accurate statement of what really was decided in *The Kojahs and Memons' case*[2] by Sir Erskine Perry. The learned Judge goes on (page 300) : "But it was said that in any case, since the judgment of Sir Erskine Perry, an uniform practice has prevailed in this Court in the exercise of its ecclesiastical jurisdiction, both in its contentious and non-contentious business, of administering the Hindu law of inheritance in the absence of proof of any special custom to the contrary. Now an examination of the records of the Ecclesiastical Side of the Supreme Court (during the interval of sixteen years which elapsed between the date of Sir Erskine Perry's

(1) (1875) 12 Bom. H. C. R. 294 (2) (1847) Perry O. C. 110

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decision and 1863) shows that there were as many as ten applications for letters of administration to Khoja estates, seven of which were disposed of by the Registrar as non-contentious business and three by the Court itself." (The learned Judge then deals with the instances.) The learned Judge then proceeds: "It is to be remarked that in all these cases, with the exception of two, the widow either applied for administration or entered a caveat, and that in all administration was either given to the widow, or, if not, it was with her consent, or under special circumstances, analogous to those of an undivided Hindu family, as in the case of *Vallu Musani*. It may be said that it would be unsafe to draw any positive conclusion from these scanty materials as to what the practice of the Court really was, although they undoubtedly point to such a practice as I have stated, and are difficult to explain on any other supposition." The learned Judge then finds strong corroboration elsewhere, and cites the case of *Gangbai* v. *Thavar Mulla*[1]. The learned Judge also notices the case of *In the Goods of Mulbai*[2]. He concludes: "This summary of the decisions of this Court, as well as of the cases disposed of by the Registrar in the non-contentious business, explained by the remarks of Sir Matthew Sausse in *Gangbai* v. *Thavar Mulla*[1], satisfactorily shows, I think, that the Khojas have, for the last twenty-five years at least, been regarded *by the Court, in all questions of inheritance*, as converted Hindus who originally retained their Hindu law of inheritance, which has since been modified by special customs, and that an uniform practice has prevailed during that period of applying Hindu law in all questions of inheritance, save and except where such a special custom has been proved." Now assuming that the conclusion reached by the

(1) (1863) 1 Bom. H. C. R. 71. (2) (1866) 2 Bom. H. C. R. 276 (2nd Edn.)

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learned Judge upon a careful examination of all the materials then available be correct, it ought not to be illegitimately extended. What Sargent, J., held was that in matters of succession the Khojas were governed by the Hindu law. But in the particular case he found a practice utterly opposed to the Hindu law, proved. The concluding part of his reasoning quoted above suggests this comment. Admitting that the Khojas were Hindus before their conversion it would not necessarily follow that they "originally" took over with them into their new faith, the whole of their old law founded on their old religion, and that it is only by gradual modifications that they have departed from it. The contrary is much more likely to be true. For converts, as previously observed, are usually zealots, and in the flush of conversion would be most unlikely to retain anything which in a peculiar degree linked them with the faith they had deserted. What probably happened was that as the fervour of their Mahomedanism cooled, and they felt more and more the surrounding pressure of Hinduism, they insensibly re-adopted many of the customs and notions belonging to Hindu law and religion. It is historically probable that the numerous Catholic converts to Christianity of the western coast of India, who can now hardly be distinguished from their Hindu neighbours, were at the time of their conversion very zealous and orthodox Christians. The point is of no practical importance. For adopting Sir Charles Sargent's conclusion, it goes only this length that in matters of succession it lies upon Khojas, who assert a custom opposed to the Hindu law, to prove it. That is a much more cautious statement of the real state of the law, and based on much more solid material, than the wide proposition that until the contrary be proved Khojas must be taken to be governed by the Hindu law in all matters relating to property, succession and inheritance.

This case went up on appeal and Westropp, C. J., in delivering judgment said (page 321): "It is, however, evident from what has been said that the Khojas are not as firmly bound in matters of succession and inheritance by the Hindu law as Muhammadans proper are by the Muhammadan law, or Hindus by the Hindu law."... "Now it is manifest that such a state of the law must greatly encourage litigation, and we cannot help thinking that it would be most desirable that the Government should take steps, as was done in the case of the Parsis, to ascertain the views of the majority of the community on the subject of succession, and should then pass an enactment, giving effect to those views."

I emphatically indorse those observations of the learned Chief Justice though I doubt whether if what really had been decided in every case as yet noticed, except *Shivji Hasam* v. *Datu Mavji Khoja*[(1)], had been clearly realized the mischief to which Westropp, C. J., adverts, need have been so serious, as it has since undoubtedly become If the Khojas had been left under the Mahomedan law in all matters except those of intestate succession proper, that is to say, cases arising upon an intestacy, some of the heaviest cases which have since taken up the time of the Courts and exhausted the moneys of the litigants, need never have been heard. The present is a case in point. Even so I think the decisions have gone much too far. For the analysis I have bestowed on the cases, reveals the truth, that only two true customs were set up before the decision of Sargent, J., in *Gorbai's case*[(2)], namely, the custom of excluding daughters from the share they would ordinarily have been entitled to under the Mahomedan law, and the custom of preferring the husband's male relatives to the widow's kin in succession to property received by a

(1) (1874) 12 Bom H. C. R. 281. (2) (1875) 12 Bom. H. C. R. 294.

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Khoja widow from her deceased husband. *Gorbai's case*[1] adds a third custom which is neither consistent with Hindu nor Mahomedan law, namely, that the mother is entitled to administration before the widow. The root of all the mischief, that is really dangerous, is to be found in the assumption made by the Court ever since *Gangabai* v. *Thavar Mulla*[2], that the Khojas were to be presumed to be governed by the Hindu law in *all* matters of succession, inheritance and (since *Shivji's case*[3] till once more modified by *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy*[4]) "property". This presumption suddenly makes its appearance springing from nowhere, rooted in nothing but "the traditional practice" of the Supreme and High Court and one or two *obiter dicta* of Sausse, C. J., in *Gangbai* v. *Thavar Mulla*[2]. I say *obiter dicta* for the point which had to be decided, and was in fact decided, was this and this only, whether a certain bequest to charity was bad for uncertainty. The decision turned upon the use of the English word "charity" in an English will, and it appears to me that it was entirely unaffected by the rather strained, I should be inclined to say, irrelevant argument out of which those observations of the learned Chief Justice arose. It seems to have been contended that because the Khojas were a "Hindu caste" in the eye of the law, the use of the word "charity" in the will of a Khoja woman must be a translation of the Hindu word "Dharam". Gifts to "Dharam" have been held void for uncertainty, therefore this gift must be void. Sausse, C. J., while seeming to accept the premiss that the Khojas were a Hindu caste for all purposes of succession and inheritance (which was going much further than any case decided up to that time), held that as the will was in English drawn under English advice, "charity" was not to be

(1) (1875) 12 Bom. H C. R. 294

(2) (1863) 1 Bom. H. C. R. 71

(3) (1874) 12 Bom. H. C. R. 281.

(4) (1889) 13 Bom. 534

read as a mere translation of "Dharam", but in its English legal sense, and so the gift was good. I am unable to agree with the later opinion that these *dicta* of Sausse, C. J., were more than *obiter*.

And as to the other root of this presumption what is to be said for the "traditionary practice" extending over a period of twenty-five years? It turns out to consist of ten cases in the sixteen years following on Sir Erskine Perry's judgment and of these seven were non-contentious. In the next nine years there were very few cases, and it would probably be within the truth to say that this traditionary practice rests upon less than half a dozen contentious cases disposed of, on the Ecclesiastical Side of the Court. It might be argued that the form of the petitions even in the non-contentious cases shows clearly that the parties interested launched their petitions on the understanding that the Hindu law governed them. But I attach little or no importance to any such consideration. For the form of pleadings is pretty sure to be moulded by the views of practitioners, and it is clear that the profession jumped early to the conclusion that the Khojas were only Mahomedan in name, while in fact and in the eye of the law, they were a "Hindu caste". The truth is that the origin of the series, Sir Erskine Perry's decision, does not raise any such presumption at all, but the exact contrary. That learned Chief Justice appears to have thrown, and very rightly, the onus of proving a custom opposed, *not* to the Hindu but to the Mahomedan law, upon any Khoja alleging it. And it is very difficult to account rationally, except upon the supposition of sheer misunderstanding, for the sudden inversion of this process which so soon came into vogue and appears to have met with the approval of the Court. Up to this point then, the point from which it is generally thought by the profession, the law became settled to this effect,

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that in all matters relating to property, succession and inheritance the Khojas were to be presumed to be governed by the Hindu law, until a custom to the contrary was proved, I hope I have shown that if so settled at all the law was settled on the most insecure basis. I have paused here because the decision in *Shivji Hasam v. Datu Mavji Khoja*[1] is commonly cited as having finally laid down this rule, which has subsequently undergone at least one most material modification, and partly because I want to point out that what had to be decided and was in fact decided in *Shivji's case*[1] had nothing whatever to do with either succession or inheritance, but grafted on the law of the Khojas a dominant feature of the Hindu law of the joint family.

I do not think it can seriously be contended, when all the available materials have been thoroughly examined, that there was any warrant either in the case law or the traditional practice of the Court, then extant, for such an extension of all previous decisions.

The case in question came before the Court as a special appeal; it appears to have been treated in the lower Courts as though it were an ordinary case under the Hindu law; I do not think any special custom either in derogation of the general Mahomedan or Hindu law was set up or proved. But the learned Judges appear to have proceeded *per saltum* from the premiss that the Khojas before conversion were Hindus, one or two decisions showing that in matters of succession customs analogous to the Hindu law of the joint family had been proved, and a practice on the Ecclesiastical Side of the Court presuming that in matters of succession the Khojas were governed by Hindu and not by Mahomedan law, to the very much wider conclusion that in *all* matters relating to property, succession and inherit-

(1) (1874) 12 Bom. H. C. R. 281.

ance, they were presumed to be so governed till they could prove a local custom to the contrary.

Next follows in 1877 the case of *Rahimatbai* v. *Hirbai*[1] which was decided in the first Court by Sargent, J., and on appeal by Westropp, C. J., and Green, J. This was a sequel to the case of *Hirbai* v. *Gorbai*[2]. Gorbai having died made a will in favour of Rahimatbai. Hirbai the widow claimed her deceased husband's estate. All that is important in the judgment of the first Court for my present purpose is the seventh issue and the manner in which it was disposed of. That issue was whether in matters of inheritance the Khojas were not governed by the Hindu law, unless a custom to the contrary were proved, and Sargent, J., decided that they were, merely on the strength of his own decision, confirmed in appeal in the previous case of *Hirbai* v. *Gorbai*[2]. Westropp, C. J., in giving judgment said (page 39): "Both of these propositions are contrary to Hindu law; and as it is now a settled rule that, in the absence of proof of a special custom to the contrary, Hindu law must regulate the succession to property amongst Khojas, it is clear that the burden of proving such special customs lay upon the defendant Rahimatbai who put them forward." Thus we see in what a sudden summary manner the law became "settled". Sargent, J., and Westropp, C. J, were responsible for the previous judgments in *Shivji Hasam* v. *Datu Mavji Khoja*[3] and *Hirbai* v. *Gorbai*[2], respectively, so that it is not surprising that they should have regarded those decisions as final But I have pointed out above, after tracing the history of this doctrine from its origin to this stage, what were the real and the only grounds for the statement henceforward, for a time at least universally accepted, that this

(1) (1877) 3 Bom. 34 (2) (1874) 12 Bom. H C. R 294
(3) (1874) 12 Bom H. C. R 281

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far reaching question was settled. This case adds nothing whatever to the reasoning of the previous cases; it is instructive because it shows how easily case law is supposed to be settled. In none of the intermediate cases, the steps by which this conclusion was reached with the single exception of Sargent, J.'s judgment in *Hirbai* v. *Gorbai*[1], was any real attempt made to analyze the contents of the preceding judgments, to state them accurately and define their true scope. I have shown that every time something was assumed to have been held, which never had been held, or that an inference was drawn from materials in themselves quite insufficient to sustain that inference. But in a small Court, where the leading practitioners remain for years, have themselves probably been engaged in most of the cases and so contributed by their arguments to the decisions, and are afterwards called on to advise on each fresh litigation, it is only natural that they should advise the use of terms appropriate to what they believe to be the law applicable. That is why in all these suits we now find the pleadings couched in terms taken from the Hindu law of the joint family.

In 1880 *In re Haji Ismail Haji Abdula*[2] was decided. This was a probate case, and it was held that Cutchi Memons were not Hindus within the meaning of section 2 of the Hindu Wills Act, and therefore probate to take effect throughout India cannot be granted in the case of a Cutchi Memon testator. Cutchi Memons are Mahomedans to whom Mahomedan law is to be applied except when an ancient and invariable special custom to the contrary is established. Westropp, C. J., in delivering the judgment of the Court said (page 460): "We know of no difference between Cutchi Memons and any other Mahomedans, except that in one point connected with succession it was proved to Sir Erskine

(1) (1875) 12 Bom H C. R 294. (2) (1880) 6 Bom 452

Perry's satisfaction that they observed a Hindu usage which is not in accordance with Mahomedan law.... Under these circumstances we must hold them to be Mahomedans to whom Mahomedan law is to be applied, except when an ancient and invariable special custom to the contrary is established." It is a pity that the same view was not consistently held from 1847 about Khojas. Both sects were on virtually the same footing before Sir Erskine Perry. But in the case of the Khojas the major premiss almost immediately became inverted, while even in the case of asserted customs a relaxation of the general rule was permitted and carried great lengths; apparently because the Courts were uncertain whether they really were Mahomedans or Hindus

Here we find the effect of Sir Erskine Perry's judgment so far as it touches Cutchi Memons accurately repeated, and the correct legal consequences attached to it. Yet in all modern arguments at this bar, which I have heard, and I have heard a great many from the leaders of the profession, it has always been taken for granted that Cutchi Memons and Khojas stand in the same relation to the Hindu law, and no distinction has ever been made between them.

The next case of importance is again a Cutchi Memon case, *Mahomed Sidick* v. *Haji Ahmed*[1], decided by Scott, J. A Cutchi Memon had made a will. It was challenged on the ground that the property disposed of was "ancestral family property" and the will was held invalid on *the ground that Cutchi Memons like Hindus* had no power to dispose by will of ancestral family property.

It will be convenient to quote the more material passages from the judgment as they occur. The learned Judge says (page 9): "*The property disposed of by the*

[1] (1886) 10 Bom 1.

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wills (I should note that two wills were in dispute) consists entirely of profits made in a business started by the four brothers, Ismail, Abdsatar, Hassan and Ahmed, in 1845, under the partnership name of Haji Abdula Nur Mahomed, their father. It is now contended that the wills deal with joint family property, and are consequently invalid, and ought to be set aside . . . that the estates of the two deceased brothers, respectively, should be divided amongst the two families in accordance with the rules of Hindu law . . . . First comes the general question,—the parties are Cutchi Memons—what is the law applicable to that community with respect to inheritance? Is it Hindu law? Is it Mahomedan law? Or have the Cutchi Memons created for themselves by their conduct, since their conversion, a special customary law which differs from Hindu law, inasmuch as it recognizes no distinction between ancestral and self-acquired property; and from the Mahomedan law, inasmuch as it gives a man unlimited power of disposing of all his property by will? . . . The intimate connection between law and religion in the Mahomedan faith justifies the presumption that converts to that faith, apart from any evidence of customs which the community may since their conversion have voluntarily imposed upon themselves, would be governed by Mahomedan law. This presumption has received the sanction of the Privy Council, where their Lordships say 'but the written law of India had prescribed broadly that in questions of succession and inheritance the Hindu law is to be applied to Hindus and the Mahomedan law to Mahomedans,' and in the judgment delivered by Lord Kingsdown in *Abraham* v. *Abraham*[1] it is said that 'this rule must be understood to refer to Hindus and Mahomedans, not by birth merely but by religion also.' But at the same time it

[1] (1863) 9 Moo. I. A. 195 at p 243.

is quite clear that, where the natives of India are concerned, usage must override the presumptions of general law in matters of inheritance amongst converts to a new religion, just as much as in other matters .... The principles applicable to this case, therefore, may be stated as follows :—The general presumption is that the Mahomedan law would govern converts from the Hindu religion to Mahomedanism. But a well-established custom in the case of such converts to follow their old Hindu law of inheritance would override that general presumption." I pause here to point out what has often occurred to me, namely, that a custom needs to be proved in each case as a custom, and that so large a custom as that of incorporating a complete widely ramifying and highly technical branch of law bodily from another religion and law, seems to me wider than any custom which has ever been proved in any Court. "And a usage establishing a special rule of inheritance as regards a special kind of property would be given the force of law even though it be at variance with both Hindu and Mahomedan law." I am in entire agreement with the learned Judge so far Condensed, what he starts with is this. The Mahomedan law must be presumed to govern the Cutchi Memons and by a parity of reasoning the Khojas ; but anyone alleging a special custom in derogation of it may prove it if he can, and well proved the Court will support it. Now let us see how the learned Judge applies his principle. "Have the Cutchi Memons by their conduct shown that they retained the Hindu law of inheritance as the customary law of their community ?" (I note on that again that the proposition appears to me much too wide. To make out such custom by conduct would require literally a thousand well established instances of every feature of the Hindu law of the joint family adopted by the Memons. Not only would they have to prove parti-

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cular rules of succession upon intestacies, but also the rights of the manager, rights of enforcing partition as between members (see later *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy*[1]) and to these might be added many others, each one of which would need separate and elaborate proof.) "That question has been decided in the affirmative by a series of decisions in this Court." (These are the decisions I have already criticized and with great respect I submit that they have not decided anything of the kind.) "Cutchi Memons appeared as litigants in 1847 ... it was there held by Sir Erskine Perry that as regards Cutchi-Memon females, the Hindu order of succession applies, although it is opposed to that prescribed by the Koran." (I have shown that what Sir Erskine Perry did hold was that a single custom excluding daughters from inheritance was proved. That happened to be in accordance with the principles of Hindu, and opposed to the principles of Mahomedan, law; and that is all.) The learned Judge then proceeds to discuss the materials available on the Ecclesiastical Side of the Court, which are much richer in the case of Memons than Khojas, and concludes from these that the Hindu law has long been recognized in this Court as governing both Memons and Khojas. Upon that I need say no more than that very few of these were contentious cases, and doubtless in large measure owing to the opinion of the profession, it was taken almost for granted that in these matters of succession the Hindu law did apply. But in none of these cases was any custom set up in derogation of the Mahomedan law and duly proved as required by the learned Judge's own principle.

But the learned Judge concludes this part of his judgment: "The general principle is, therefore, that Cutchi

(1) (1889) 13 Bom. 534.

Memons are governed by the Hindu law of inheritance in the absence of proof of special custom."

It is not necessary to quote verbatim from what follows. It is, however, of great interest as exhibiting the attitude of a very learned Judge towards the question he had to try. In the first place he throws the onus of proving a custom repugnant, not to the Mahomedan but to the Hindu law, on the Mahomedans who claimed the application of their own law. This is opposed to his own principle, and can only be attributable to the belief that the general presumption had been shifted by the former decisions, as well as particular customs established by them. There is little doubt but that had the onus been placed on the party desirous of proving a custom repugnant to the Mahomedan but consonant with the Hindu law, great difficulty would have been found in discharging it. In his criticism of the evidence Scott, J., quotes witnesses who say that the Memons are governed by the Hindu law. True, but since when? Since Sir Erskine Perry's judgment. The emphatic witness who declares three times over that the community is now under the Hindu law which Sir Erskine Perry made for them "Hindu, Hindu, Hindu law" was probably so vehement because he was so indignant. It is enough to repeat that Sir Erskine Perry never did decide that the Hindu law governed these people. He found in favour of a particular custom, a very limited custom, which no one in the community except daughters, was at all likely to wish displaced. This is in all probability why Sir Erskine Perry's decision was not taken up on appeal to the Privy Council. But Scott, J., certainly thought that the evidence laid before him afforded confirmation of the view founded on the decisions I have criticized, that the Hindu law of the joint family governed these people. He next proceeds to discuss the question whether, if

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that were so, the wills in suit were valid. He says "their validity, therefore, very much depends on the further question whether the property was ancestral or self-acquired." In the view taken so far by the learned Judge it might be thought that the validity of the wills depended entirely, not "very much" upon the property being self-acquired. The learned Judge then proceeded to apply the doctrine of nucleus and holds that the property bequeathed was ancestral family property and therefore that the wills were invalid.

It will be observed that this imports virtually the whole of the Hindu law of the joint family into the law of the Cutchi Memons, and is a great enlargement of any former decision. It is interesting to note that the evidence which the learned Judge heard impressed him with the idea that the community were anxious once more to be placed under their own law. He attributes this to a recent change of opinion. He believes that *they acquiesced willingly in the decision of* Sir Erskine Perry and for many years thereafter were quite content to be under the Hindu law of the joint family. I submit with respect that there is absolutely no ground for any such inference. They could hardly have anticipated that what was decided in 1847 would be stretched, as it has since been, so as not only to establish a very innocuous custom but to bring in gradually the entire complicated and to an enterprising commercial community intensely irksome Hindu law of the joint family. It is quite likely that they were impressed by the decision of Sir Erskine Perry and for many years did believe that the Courts had made a new law for them; but with increasing intelligence and prosperity it is incredible that they should have cheerfully acquiesced in the introduction of so radical and far reaching a change. They might have resigned themselves without much apprehension to all that was ever actually decided

against them up to the judgment in *Shivji Hasam* v. *Datu Marji Khoja*(1). That, however, was a mofussil case, and is hardly likely to have attracted much notice among lay Khojas and Memons, although in the narrow circle of the profession it was taken to have finally introduced if not the whole, very nearly the whole, of the law of the Hindu joint family into the law governing Khojas and Memons. I have dwelt at some length upon this case, not only because the opening portion of the judgment is theoretically interesting in tracing the progress of this wide legal change by means of a series of judgments, but because it is the first, and, I believe, the only case yet decided, in which the principle or supposed principle of the earlier decisions has been carried the length of invalidating a will made by Memons or Khojas on the ground that it purported to dispose of ancestral joint family property, and by implication grafted on the law of Khojas and Memons the most dangerous and injurious of all the features of the Hindu law of the joint family, the doctrine of nucleus.

I should have mentioned, keeping strict chronological order, the case of *Ashabai* v *Haji Tyeb Haji Rahimtulla*(2), decided by Sargent, J. The learned Judge says (page 120): "The first question of importance which presents itself for decision in this case is as to the law of inheritance applicable to Cutchi Memons, to which caste the parties interested belong. The ecclesiastical records of this Court show that Khojas and Cutchi Memons have ever since the decree in the case of the 'Khojas and Memons' before Sir Erskine Perry ... been regarded in the Supreme Court and subsequently in this Court as Hindus who had been converted to Mahomedanism whilst retaining their Hindu law of inheritance; and, so far as Khojas are concerned, the

(1) (1874) 12 Bom. H. C R 281 (2) (1882) 9 Bom 115.

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decision of the Court of Appeal in the case of *Hirbai* v. *Gorbai*(1) must be taken as conclusively deciding that the *onus* of proving a custom of inheritance not in conformity with Hindu law lies upon those who set it up. The above records are even richer in instances of the application of Hindu law of inheritance to the estates of Memons than to those of Khojas, and establish a non-contentious practice extending over many years. I think, therefore, that in the absence of any special ground of distinction, and none was suggested, no sufficient reason exists for placing Memons on any different footing from Khojas as regards the application of the Hindu law of inheritance in the absence of proof of any special custom, although undoubtedly it leaves the law, as pointed out by the Chief Justice in the above case of *Hirbai* v. *Gorbai*(1), in an incomplete state, which can only be satisfactorily dealt with by express legislation." And proceeds to apply the Hindu law, texts and all, to the facts of this family, found in the case. Now I note first the use of the word "caste" again as though the Memons really were Hindus. Next, it scarcely needs to be pointed out that this judgment is difficult to reconcile with that of Westropp, C. J., in *In re Haji Ismail Haji Abdula*(2), decided five years previously. There the learned Chief Justice was clearly indisposed to assent to the proposition that the Memons were so far shown to be under any other law than the ordinary Mahomedan law with the single exception of the custom proved in derogation of that law in 1847. Nothing, as far as I can ascertain, had occurred in the interval to warrant any departure from or modification of the opinion then expressed by Sir Michael Westropp. Yet both in this case and in that of *Mahomed Sidick* v. *Haji Ahmed*(3) it appears to have been neglected. And

(1) (1875) 12 Bom. H. C. R. 294 (2) (1880) 6 Bom. 452
(3) (1885) 10 Bom. 1.

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once more, as regards the Memons, the sweeping conclusion, that they are in all matters of inheritance governed by the Hindu law of the joint family, is chiefly based upon non-contentious matters coming before the Registrar of the Ecclesiastical Side of the Court, and partly upon the fact that the Supreme Court and after it the High Court had ever since 1847 regarded Memons and Khojas as converted Hindus who had retained the whole of the Hindu law of succession, and apparently along with that, that of the joint family. For here Sargent, J., goes back to the time, when the grandfather was living with his son who predeceased him, and speaks of them as constituting a joint undivided family. He refers also to a projected partition which fell through and cites the Mayukha as governing the resultant rights of property of the members of the family. As far as I can gather from the report the main claim of the women plaintiffs was utterly inconsistent with the Hindu law but it is not necessary to pursue that further

I come next to the case of *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy*[1] decided on appeal by Sargent, C. J., and Bayley, J. This suit was instituted by Cassumbhoy, the son of Ahmedbhoy Habibbhoy, for partition. The first Court decreed it. This decision was reversed on appeal, and I will deal critically with that very important judgment. First, let me note that the trial Judge threw the onus of proving a custom in derogation of the Hindu law of the joint family upon the defendant. This was very natural in the light of the decisions I have just been dealing with, particularly *Ashabai's case.* Sargent, C. J., says (page 540): "Now it is to be remarked that the rule of this Court, to which Sir M. R. Westropp refers in the last case, *Hirbai* v. *Gorbai*[2], is based on a dictum of Sir Matthew Sausse in *Gangbai* v.

(1) (1889) 13 Bom 534 (2) (1875) 12 Bom H C R 294

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Thavar Mulla(1), and the practice which had prevailed during the previous twenty-five years in granting letters of administration to the estates of deceased Khojas which is particularly referred to in the judgment of the Division Court in *Hirbai* v. *Gorbai*(2). The dictum of Sir Matthew Sausse, that 'the Khoja caste had been held to be governed by Hindu customs and laws of inheritance,' must have been based on the practice of granting letters of administration to Khojas prior to 1863, when *Gangbai* v. *Thavar Mulla*(1) was decided; for besides the case before Sir Erskine Perry in 1847, which certainly did not lay down any such rule, the question would appear to have never arisen except on the ecclesiastical side of the Court. So far, therefore, as the rule is confined to the simple question of inheritance and succession, as to which the law-books present no difficulty, it would appear to be based on a long-established practice of the Court of applying Hindu law in the absence of proof of custom to the contrary, which might well justify the *onus* being thrown on the party alleging such custom, of proving it." Surely this indicates a marked backward swing of the pendulum from the same very learned Judge's attitude revealed in the case of *Ashabai* v. *Haji Tyeb Haji Rahimtulla*(3) decided four years earlier. It may be conjectured, with all proper respect, that Sir Charles Sargent, now Chief Justice, who almost alone had never once misconceived or permitted any extension of what really was decided in *The Kojahs and Memons' case*(4), began to doubt whether the subsequent series had not carried the law much too far. At the same time, as I shall have to show when I have done with the cases, it is extremely difficult, if not impossible, to dissociate the Hindu law of "succession" from

(1) (1863) 1 Bom. H. C. R. 71.
(2) (1875) 12 Bom. H. C. R. 294.
(3) (1882) 9 Bom. 115
(4) (1847) Perry O. C. 110.

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all that is inextricably bound up with it, by way of antecedent, in the general Hindu law of the joint family. I doubt myself whether it is possible or whether the distinction sought to be made in the case now under discussion between "simple" succession and such points as were dealt with by Scott, J., and for the matter of that by Sargent, J., himself in *Asha's case*[1] can be practically maintained.

The ground of this distinction taken by the learned Chief Justice is however very clear. Briefly it is this: The right of the son, under the Hindu law, to demand a partition of joint family property during his father's life-time, particularly when the bulk of that property is moveable, has always been uncertain and much debated among Jurists, right up to the decision in *Jugmohandas Mangaldas* v *Sir Mangaldas Nathubhoy*[2]. It is extremely unlikely that in or about A. D. 1400 the Hindus, who were converted and became Khojas, had any definite ideas about it. It cannot, therefore, be presumed that they carried that feature of the present Hindu law with them into their new faith, and it lies on the party alleging, that it is the custom of the Khojas that a son has the right to demand partition from his father, to prove it. This was held in fact not to be a question relating to succession or inheritance at all Further on in his judgment the learned Chief Justice says (page 543): "It is true that the witnesses go even so far as to say that there is no distinction between ancestral and self-acquired property as regards alienation by the father, but without being able to cite any instance of a Khoja alienating ancestral property, by will or otherwise, away from his sons; but, however that may be, the right of the sons to object to alienation by their father is quite

(1) (1882) 9 Bom 115 (2) (1886) 10 Bom 528.

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consistent with their having no right to demand partition of ancestral property during his life, which is the only point now for consideration, and which affords the only reasonable explanation of their submitting to be turned out without any share." With great submission it may be doubted whether such a right as is here hinted at, and which is almost certain to give rise to much litigation, is not inconsistent with the absence of any right to demand partition. It is clear that the latter is opposed to the Hindu law; while the former could only be upheld on the supposition that the Hindu law applied. The one is indeed a complemental right of the other. It is because according to the principle of the Hindu joint family every son takes an interest at birth that he is entitled as against his father to demand partition, and similarly to prevent his father independently alienating any part of the joint family property in which *ex hypothesi* the son has his own right. It would be strange indeed on the supposition of conscious selection, which has to be here introduced in place of the older theory that as Hindus they unconsciously, so to speak, carried the whole of their former law with them, these communities should have adopted the right of the son to prevent his father alienating any part of the joint family property but should have rejected the right of the son to demand partition of it. Sargent, C. J., proceeds "Nor, indeed, is it to be wondered at that the custom should be different in Bombay from what it is stated to have always been in Kathiawar and Cutch. Since the Khojas have settled in Bombay, which is said to have been for the last hundred years, they have engaged in commerce, and greatly increased in wealth. From being cultivators of the land with very limited personal property, they have become active and energetic merchants, contractors, and men of business, and it was only to be expected that, under these circumstances,

such a custom as is stated to have existed in Kathiawar would in course of time undergo modification. Such would naturally be the wish of the leading men of the community who had accumulated capital, and would gradually under their influence permeate the lower strata of the body corporate until the old usage would gradually fall into desuetude, and the strict right of the son, if it ever existed, be lost, with the approval of the general community." I submit again that all this applies with at least equal force to the possible right of a son to prohibit his father's alienations, and with much greater force to the introduction of the devastating doctrine of nucleus. I am not surprised that the witnesses in this case refused to recognize any distinction among Khojas between ancestral and self-acquired property. Yet in *Mahomed Sidick* v. *Haji Ahmed*[1] the burden of proving this as a special custom was thrown upon the party so alleging, and the Court held that he had failed to discharge it. As I said before, had the burden been placed upon the other party, what occurred in this case only a few years later fully bears out my anticipation that it in turn would not have been discharged. What can be more continually oppressive, harassing and vexatious to a prosperous business-man than the reflection that he will not be permitted to dispose of his life's earnings by will because in his childhood he was nurtured and trained for business in his father's home and little village shop. Yet that is the effect of the decision in *Mahomed Sidick* v. *Haji Ahmed*[1].

In *Abraham* v. *Abraham*[2] the Privy Council pointed out that usages are not independent of volition, and may, unless their continuance be enjoined by law, as they were adopted voluntarily, be also changed or lost by desuetude. Now in the case of these Khojas

(1) (1885) 10 Bom. 1. (2) (1863) 9 Moo. I A 195

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consistent with their having no right to demand partition of ancestral property during his life, which is the only point now for consideration, and which affords the only reasonable explanation of their submitting to be turned out without any share." With great submission it may be doubted whether such a right as is here hinted at, and which is almost certain to give rise to much litigation, is not inconsistent with the absence of any right to demand partition. It is clear that the latter is opposed to the Hindu law; while the former could only be upheld on the supposition that the Hindu law applied. The one is indeed a complemental right of the other. It is because according to the principle of the Hindu joint family every son takes an interest at birth that he is entitled as against his father to demand partition, and similarly to prevent his father independently alienating any part of the joint family property in which *ex hypothesi* the son has his own right. It would be strange indeed on the supposition of conscious selection, which has to be here introduced in place of the older theory that as Hindus they unconsciously, so to speak, carried the whole of their former law with them, these communities should have adopted the right of the son to prevent his father alienating any part of the joint family property but should have rejected the right of the son to demand partition of it. Sargent, C. J., proceeds "Nor, indeed, is it to be wondered at that the custom should be different in Bombay from what it is stated to have always been in Kathiawar and Cutch. Since the Khojas have settled in Bombay, which is said to have been for the last hundred years, they have engaged in commerce, and greatly increased in wealth. From being cultivators of the land with very limited personal property, they have become active and energetic merchants, contractors, and men of business, and it was only to be expected that, under these circumstances,

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(1) (1885) 10 Bom. 1 (2) (1863) 9 Moo. I A. 195.

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and Memons so far from the customs already legally enforced by our Courts, and of which further extension in every direction is always being attempted, being enjoined by, they are directly opposed to, their law. And it is certain, as appears clearly enough from the dicta of most of the eminent Judges whom I have been quoting, that as far back as 1880 it was generally felt that if the will of these communities could be consulted, they would throw off all connexion with the Hindu law. Unfortunately for them, the Court took the matter out of their hands, and stereotyped a custom here and there, while giving colour to the very much larger proposition, that the Hindu law was to be presumed to apply, not this or that custom, be it reiterated, but the whole Hindu law, in matters of succession and inheritance. But for the decisions following upon *The Kojahs and Memons' case*[1] of 1847 no one, who has any knowledge of the subject or the sentiments of the leaders and representatives of these sects, could doubt that nothing would be heard today of any custom tending to bring them collectively under the bondage of the law of the Hindu joint family. Sir Charles Sargent's comments on the contemplated legislation of 1878 are strikingly suggestive, indeed, I think conclusive on this point. The Court, having held that the plaintiff had no right to insist upon a partition, went on to consider whether the defendant's wealth was traceable to a "nucleus", thus again by implication importing that special feature of the law of the Hindu joint family into that of the Khojas. These *obiter dicta*, very unfortunate *obiter dicta*, I cannot help thinking, together with the other *obiter* I have cited ante, suggesting that a Khoja son had a right to prohibit his father alienating the joint property, bore their natural fruit. In the case of

(1) (1847) Perry O. C. 110

Ahmedbhoy Habibbhoy v. *Sir Dinsha M. Petit*[1], which I tried, although the actual prayer was for specific performance of a contract for sale, the plaintiff made the most desperate attempts to get a side decision from the Court that his property was his own, and that his sons had no right to it on the footing of a Hindu joint family. That question could not properly be decided in that suit. Shortly after another indirect attempt was made by way of a summary suit under the Specific Relief Act to get the same question answered. But it is still open and will inevitably give rise to enormously expensive and protracted litigation.

In an insolvency matter, *In the matter of Haroon Mahomed*[2], decided by Sargent, C. J., and Scott, J., the parties were Cutchi Memons. The question was whether one alleged member of a partnership was to be adjudged insolvent. The firm as a firm had been so adjudged and none of the other parties objected. The matter seems to have been tried on affidavits. Sargent, C. J., said (page 193): "As Cutchi Memons, the rules of Hindu law and custom apply to them, and the position of the appellant with regard to the family property must be determined by the same considerations as would apply in the case of a member of a joint and undivided Hindu family." This once more brings the Cutchi Memons under the entire law of the Hindu joint family and appears to me, with respect, irreconcilable with what the same learned Chief Justice had laid down in *Ahmedbhoy Habibbhoy* v. *Cassumbhoy Ahmedbhoy*[3], where the presumption was carefully restricted to matters of succession and inheritance. True that was a Khoja case, but looking to the whole current of decisions if any distinction can be made at all it would, I think, rather be in the direction of exempting the Memons to a greater extent

(1) (1909) 11 Bom L R 545 (2) (1890) 14 Bom 189.
(3) (1889) 13 Bom 534.

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than the Khojas from the law of the Hindu joint family. The Chief Justice goes on: "The firm then was a family firm, and was the property of a family subject to Hindu law."

But it is certainly astonishing to find the learned Chief Justice who had so very recently set himself to strike out "property" from the rule that Khojas and Memons are subject to the Hindu law in all matters "relating to property, succession and inheritance" now laying down the law more broadly and in more unqualified terms, I think, than ever before in the opposite direction.

I may conclude this review of the case law by referring very briefly to the decisions of Ranade, J., which have the effect of *bringing* two more groups of Mahomedans, under the Hindu law, whether partially or completely I will not stop to enquire. In *Bai Baiji* v. *Bai Santok*[1], it was held that the Sunni Borahs of Dhandhuka were governed by the Hindu law in all matters of succession and inheritance. Ranade, J., said:—

"The following principles may now be regarded as settled: (1) Mahomedan law *generally* governs converts to that faith from Hinduism; but (2) a well established *custom* of such converts following the Hindu law of inheritance would *override* the general presumption, (3) This custom should be confined *strictly to* cases of succession and inheritance (4) If any particular custom of *succession* be alleged which is at variance with the general law applicable to these communities, the burden of proof lies on the party alleging such special custom."

The decision in *In the matter of Haroon Mahomed*[2] shows how very much further the Courts have actually gone in practice than this cautious statement of principle would have warranted. Ranade, J., says (page 56):—

"The appellant's counsel very properly urged that the burden of proving that a community of people professing the Mahomedan faith were not

(1) (1894) 20 Bom. 53 (2) (1890) 14 Bom. 189.

governed by the Mahomedan law of succession, but by the usages and customs of the old Hindu faith to which their ancestors belonged, rested on the defendant. At the same time we do not think he was right in maintaining that this usage or custom should be proved in regard to the particular relationship which the parties to the present suit bear to one another. If the evidence is clear on the point of the general prevalence of the Hindu rules of succession in preference to the rules of Mahomedan law, the burden of proof will be discharged, and it will then be for the appellant to show that this particular relationship was excluded from the sphere of the proved general usage of the community."

This brings out very clearly a point taken in an earlier part of this judgment; and I submit that the dictum of the learned Judge is open to question. I do not see why any distinction should be drawn in these cases merely because the parties happen to belong to a particular religion and be under a particular law, where it is said that a custom drawn from another religion and law obtains among them between the proof of that and any other custom. A custom is set up in derogation of the general law, and, in my opinion, it is that custom which the party alleging it is bound to prove. I think that the enquiry ought to be restricted to the proof of that custom and not opened upon so wide a ground as the proof of the adoption of a whole body of alien law, which really never is proved or attempted to be proved, and always starts from general premises reasoning from which may or may not include the particular custom alleged. It is due to this method of dealing with the cases, that bodies of Mahomedans have so facilely been adjudged to be generally governed by the Hindu law of succession, inheritance and the joint family, chiefly upon the undisputed fact that before conversion they too were Hindus. All the facts which are usually put first in this process of proof and are usually taken to warrant the conclusion by inference upon the particular point to be determined, a custom of which in this method of treatment

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no proof at all need be given, ought, in my opinion, to be merely adduced as ancillary to and corroborative of what other direct evidence proving the alleged custom may be forthcoming. Had that method been followed, it is doubtful, whether the conclusions which have been arrived at in some cases would ever have been reached.

The learned Judge then proceeds to enumerate all the cases I have dealt with, without critically examining any of them, but as a result he draws the principles which I have quoted above. These I have shown to be very different from what in practice has been assumed to be the result of the cases, as they developed, I think I might correctly say evolved, the one out of the other. The learned Judge then goes on to state that the question which had to be answered first was whether this group of Mahomedans occupied the same position and status as the Khojas and Memons. It is to be noted that this was a claim by a daughter under the Mahomedan law, and that the oral evidence alone, taken with the long list of decrees mentioned by the learned Judge, would have been amply sufficient to establish the custom relied on by the defendant, that among these Mahomedans a daughter was excluded without any necessity of going further and laying it down generally that this community had adopted the whole Hindu law of succession. It is extremely probable that in the case of daughters such a custom (which was exactly the same as that upheld in *The Kojahs and Memons' case*[1]) has grown up and long been observed among the Mahomedans of that part of the Presidency.

Another judgment in the same volume, *Maharana Shri Fatesangji Jasvatsangji* v. *Kuvar Harisangji*

[1] (1847) Perry O. C. 110.

Fatesangji[1], similarly extends the Hindu law of succession and inheritance to the Molesalam Girassias of Gujarat. This suit comes from Broach; it was decided by Ranade, J., shortly after the case last noted, and many of the materials were the same; the parties were originally Rajputs. The plaint raised a very simple narrow point, namely, whether the plaintiff was entitled to *khoraki poshaki* (food, dress and maintenance). That is a custom not, with submission, any more a part of the general Hindu than of the general Mahomedan law. And it would have been enough to put the party alleging it to the proof of it. This would have been in strict accordance with the learned Judge's own principles deduced in *Bai Baiji* v. *Bai Santok*[2] from all the preceding decisions. But the course followed was the common course. First, it was proved to the satisfaction of the Court that the parties, although Mahomedans, had adopted the entire Hindu law of succession, etc., then the onus of proving a custom inconsistent with or opposed to the Hindu law was thrown on the defendant. *Juwai*, *khoraki poshaki*, etc., are all incidents of State tenure where the Raj itself is impartible. I should hesitate to say myself that they are any more opposed to the Mahomedan than the Hindu law. Mahomedan States throughout Kathiawar and Rajputana, I believe, observe these customs. But the learned Judges in this appeal were of opinion that these appanages were part of the Hindu law, as modified in cases of impartible estates, and therefore threw the burden of proof on the defendant. Again I say the decision was reached by what, it is respectfully submitted, was a wrong path, and goes far beyond the scope of the actual controversy, deciding much more than was needed to dispose of the particular claim.

(1) (1894) 20 Bom. 181 (2) (1894) 20 Bom 53.

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This review of the case law is necessary in order to come to a decision upon the question how far the Hindu law of the joint family governs Khojas in this Presidency. For it is obvious that if it does not govern them the plaintiffs in this suit have no cause of action. Every one of the reliefs sought is founded directly or indirectly in the Hindu law of the joint family. And the difficulty which always confronts a Judge of this Court in such cases, a difficulty which is daily growing, is to draw a line, if possible, between "succession and inheritance" and the complete Hindu law of the joint family. The late Mr. Justice Russell is credited with the witty epigram that under the existing law of this Presidency, Khojas and Memons are to all intents and purposes live Mahomedans but dead Hindus. If that correctly represented the effect of the decisions it would be very easy to administer the law, and its administration on those restricted lines would not give rise to much just complaint. Unfortunately there has been a steady tendency, clearly marked in the most recent cases, to substitute the general presumption that the Hindu law, for the natural and older presumption that the Mahomedan law, governs these groups of Mahomedans, and to make that presumption the starting point of each enquiry. I think I have conclusively demonstrated that the principles which the later cases purport to enforce cannot, really, be found, apart from rather sweeping generalizations, in the cases from which they are said to be derived. So far as the Khojas and Memons are concerned three customs have been held proved, two in agreement with, and one opposed to, the Hindu law, and all these customs belong properly to intestate succession; these are: (1) That daughters do not inherit as they would under the Mahomedan law. (2) That the brothers of a deceased

person or his kindred (reversioners?) are to be preferred to the widow—this may be taken to be in accordance with the Hindu law if it be assumed further that the family was joint in the sense of a Hindu joint family but not otherwise. (3) That a mother is to be preferred to a widow for purposes of administration. Leaving aside the Broach and Dhandhuka cases decided, within a few months of each other, by Ranade, J., where in both cases the point actually in dispute was really decided upon proof (or supposed proof) that the groups concerned had adopted the whole Hindu law of the joint family, these are the only customs which have been held proved amongst Mahomedans in this Presidency as far as I know, certainly the only customs proved amongst Khojas and Memons in derogation of the Mahomedan law. And from the first case to the last, when the learned Judges turn back to first principles, we find a reiteration of the proposition that where Mahomedans are concerned the Courts are to start with the presumption that the Mahomedan law governs them. So that, but for the constant references to the "traditionary doctrines" of the Supreme and High Court on its Ecclesiastical Side, which is supposed to have established the further proposition that Khojas and Memons are governed by the Hindu law (not by any particular feature of it, adopted as a custom) in all matters of succession and inheritance, it would appear that there was scant ground indeed and that but treacherous, for the superstructure of case law and resultant concensus of professional opinion, which today combine to render it a doctrine accepted and hardly even challenged that to this extent *these groups of Mahomedans* have renounced their own, in favour of the Hindu law. But the decisions go much further. For while I do not think that in any case which is regarded as an authority, and so made a fresh starting point, is there

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to be found as a statement of recognized and settled principle, more than this, that in succession and inheritance (I omit the word "property" only found in Sir Michael Westropp's judgment in *Shivji Hasam* v. *Datu Mavji Khoja*(1)) the actual decisions cover almost the whole field of complicated law, which is the Hindu law of the joint family. Thus it has been decided that a Cutchi Memon cannot dispose by will of "ancestral joint family property", although it is clear that at the time the will was made, no question of succession and inheritance had been opened, nor can the quality of the property really come in question, during the life-time of a Mahomedan under his own law, as necessarily referable to two opposed categories, ancestral or self-acquired. It is true that the learned Judge who decided that case took evidence (but after, as is now submitted with all deference, throwing the onus on the wrong party) of a custom amongst Memons under which no distinction is made between ancestral and self-acquired property. But if the learned Judge had kept his own stated principles in sight, and I think it ought to be presumed that he did, he could only have taken that course upon the supposition that the distinction between ancestral joint family property and self-acquired property was included under the terms "succession and inheritance". The whole Hindu law of the manager was introduced, without any evidence of custom, by the judgment in *Shivji Hasam* v. *Datu Mavji Khoja*(1) presumably because at that time the learned Chief Justice believed it to have been already established, and so to have become a part of the law of the Presidency, that the Hindu law of joint family property must in each case now be presumed in the absence of custom to the contrary to govern Khojas and Memons. In the

(1) (1874) 12 Bom. H. C. R. 281.

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concluding part of the judgment of Sargent, C. J., in *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy*[1], in spite of having declined to admit so broad a proposition without qualification, and after having refused to apply the Hindu law in one very important point to these Khojas, we find the whole argument proceeding upon the assumption that the Hindu law of the joint family is applicable. The nucleus doctrine is taken for granted as having been engrafted with the rest of the Hindu law of succession and inheritance upon the law of Khojas and Memons. And at last in *Haroon's case*[2], we find Sargent, C. J., himself giving judgment upon the basis of the parties being governed by the Hindu law of the joint family, in an insolvency matter, which viewed in any light could hardly fall within the principle so frequently and carefully enunciated by that very learned Judge himself in previous cases, that the presumption went no further than matters of inheritance and succession. Here a firm carried on by four Cutchi Memon brothers was treated exactly as though they were a joint and undivided Hindu family and the firm a joint family asset. Never has such a custom in derogation of the Mahomedan law been set up, as far as I know, much less proved; and it can only be upon the assumption that an entire system of law can be adopted as a "custom" and that the entire Hindu law, not only of succession and inheritance, had been so adopted and proved to have been adopted by Khojas and Memons, that the judgment in this case is intelligible. In the last case decided by Sir Michael Westropp, however, that most eminent Judge, so far as Cutchi Memons are concerned, went right back to the original (and I submit with great respect the correct and only correct) starting point. He refused to recognize any established general distinc-

(1) (1889) 13 Bom. 534. (2) (1890) 14 Bom 189.

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tions between these and other Mahomedans and, excepting the single custom proved up to that time, the exclusion of daughters from the inheritance in 1847 declared emphatically that any other custom alleged in derogation of the general Mahomedan law must be proved strictly by the person alleging it. I cannot help thinking it much to be regretted that the learned Judge, who decided *Mahomed Sidick* v. *Haji Ahmed*[1] a few years later, did not guide the proceedings by the principles thus emphatically laid down by Sir Michael Westropp.

At the same time I own that I find it very difficult to say precisely where the Hindu law of succession and inheritance can be separated from the rest of the Hindu law of the joint family. At present the Memons and Khojas, taking them together, are in this peculiar and most undesirable position. They are presumed to be governed by the Hindu law in all matters of succession and inheritance; but in all other respects they are presumed to be governed by the Mahomedan law. It has been definitely decided (1) that among them daughters are excluded from the inheritance and are entitled to no more than maintenance and dower. (2) That the relatives of the deceased husband take in preference to the widow (this leaves a wide door open for further complicated and expensive litigation, and is utterly inconsistent with what appears to have been often taken for granted in the arguments and criticism of the evidence that a widow can dispose of her husband's property by will). (3) That a mother is entitled to administer before a widow, referable to no known principle and resting upon a proved custom only. (4) That a son cannot enforce partition against *his* father (consonant with no known law), but (obiter) that he may prohibit his father alienating the joint family property, again a wide door opened to the most pro-

[1] (1885) 10 Bom. 1.

tracted and expensive litigation. (5) (More or less obiter) That the nucleus doctrine of the Hindu joint family governs Khojas and Memons, which is I think the most disastrous feature in any of the decisions, not referable certainly to the "established principle" that the Hindu law of succession and inheritance governs these people. (6) That the law of the manager in a joint family, under the Hindu law, governs Khojas and Memons. (7) That in every respect the law of the Hindu joint family governs Khojas and Memons where members of a family are found to be living and trading together (*Haroon's case*[1]). No wonder these communities are growing restive and dissatisfied. The whole law needs the most careful revision, and should, in my opinion, wherever possible, and it has shown a tendency to extend the operation of the Hindu law of the joint family to these groups of Mahomedans, be once more confined within the narrowest limits the cases allow. Can it be said that the radical distinction made by the Hindu law of the joint family between joint family and self-acquired property can be wholly separated and kept apart from what Sir Charles Sargent called a simple law of succession and inheritance? If it can, and if so long as the head of the family is alive he can, under the Mahomedan law, dispose of the whole of the property by gift *inter vivos* or by will to the extent of one-third, some part at least of the hardship, which has been inflicted upon these groups of Mahomedans by case law, might be remedied But it would not be the greatest part. For in every case of an intestacy the question, now to be answered with reference to the Hindu law, would surely be raised, whether the property was joint family or self-acquired, involved in which would be the endless quest after the original nucleus. Again there is a probability, to say no

(1) (1890) 14 Bom 189.

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more, of masses of litigation to prevent Khoja and Memon fathers dealing with their wealth as they please. As the law stands, no one dare buy real estate from a Khoja or Memon unless all his children join in the conveyance, for it is impossible to say what, if any, title the father has to give. Similarly, on a minor point trouble has already arisen and is likely to increase until this branch of the law is brought into something like consistency and definiteness, made referable to some plain principle of universal applicability, and not as at present left in something very like legal chaos. I mean alienations by an adult member of a Khoja or Memon family, not himself the head for the time being of that family. Under the Mahomedan law such a case would present no difficulty, but under the law governing these peoples at present it is virtually impossible to say what may happen. Such a case actually came before my brother Macleod a short time ago. The alienee long after the alienation brought a suit for "partition" and claimed to have the "share" of his alienor made over to him. As a Mahomedan, the assignor would have sold not more than a *spes successionis*, and the transfer would have been invalid. But it is very different under the Hindu law. A member of a joint undivided Hindu family may alienate his "share" and the Courts appear to have held that the alienation operates in law as a severance of the joint tenancy. This curious doctrine is, I suppose, imported bodily from the English law of joint tenancy, to which except in the employment of the term "joint" the Hindu law of the joint family offers no single point of correspondence, is indeed diametrically opposed to it. This I have laboured to demonstrate on more than one occasion since I have been in this Court. Logically, I contend (and with great respect to the current of authority against me, shall always feel convinced) the alienation by a member

of a joint undivided Hindu family passes nothing until the alienee effects a partition by suit. I see no objection to his being allowed to do this, provided he does it during the life of his alienor, for so long he is entitled to all the legal rights of the alienor including the right to partition. But as soon as the alienor is dead I am unable to see upon what principle of law or reason the alienee has anything left to sue for. For, *ex hypothesi*, the share which was alienated has ceased to exist, has gone over by survivorship to others who do not take through the alienor and are not answerable for his debts. I mean in the case of any three Hindu brothers holding joint family property one alienates his share. The alienee does nothing. In a year the alienor dies. Next year the alienee sues for his share and the law well settled in this country is that he is entitled to revive the dead man and take his share by partition from the other two brothers who have received no part of the consideration. This I repeat appears to me with great submission neither good law nor good reason. Still for the present it is the law and results in most complicated problems. The alienor might at the time of the alienation have been entitled on partition to, say, a third, but by the time the alienee sues, he may be entitled on partition to no more than a sixteenth; what has the alienee taken in law? The case before Macleod, J., presented difficulties of that kind, but was settled by consent. Its importance lies in this, that no one in the course of the argument for any of the numerous parties interested, nor the learned Judge himself, ever appears to have doubted but that the Hindu law applied and governed the case. But does it? Is this in reality a case of succession and inheritance at all? It is nothing short of a case of the complete Hindu law of the joint family in one of its most perplexing forms. And if the course taken at that trial be correct and the consent-

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decree correct (which I take leave with respect to doubt) what becomes of *Cassumbhoy's case*(1)? For here any Khoja by merely alienating his "share" in the estate can bring about an immediate partition at the instance of the alienee. But Sargent, C. J., declared that the son had no right to a partition in his father's life-time. No case has as yet occurred I believe in which the right of Khojas and Memons to insist upon a partition *inter se*, I mean in the case of, say, six brothers, has yet arisen. And this points very plainly to some radical difference between their understanding of their own law and the large assumption which the Courts have made for them, that in all matters of succession, etc., they are governed by the Hindu law. If left to themselves, and admitting that they would not adhere strictly to the Mahomedan law, they would probably in every such case divide the patrimony between the surviving sons, who would not regard themselves as constituting a joint family in the Hindu sense. *Haroon's case*(2) decides that they are a joint Hindu family whatever they may think to the contrary, but that case goes much further than any other, and it is plain from Haroon's own petition that he at least did not much believe in the applicability of the whole law of the Hindu joint family to himself and his brothers. I will say for myself, upon a long experience particularly in those districts whence most of the evidence, when a custom was alleged, has been drawn as well as from a study of that evidence so far as it appears in the reported cases, that I do not believe that the modern Khojas and Memons have ever formed among themselves "joint families" in the Hindu sense.

I am pretty confident that there is not a family of importance to be found among these sects in Bombay, which, could a complete examination be made, would not soon show marked and radical divergences from the

(1) (1889) 13 Bom. 534. (2) (1890) 14 Bom. 189.

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Hindu theory. Those divergences would be less marked no doubt among the poorer classes, living chiefly by agriculture in Guzerat and Kathiawar, but I do not doubt they would still be easily traceable. The custom of giving a son "his share" and letting him go need have nothing to do with the rigid Hindu law of the joint family. The notion that a son is entitled to a portion is common amongst almost all peoples and is a very different notion from the vested equal right taken at birth by every male born into a joint Hindu family. But what I would most emphatically protest against is the application of that part of the Hindu law of the joint family which deals with self-acquisitions and distinguishes them from joint family property. The nucleus doctrine is, I believe, inseparable from that part of the Hindu law, notwithstanding the very great lengths it has sometimes been carried. For it is strictly logical; if regarded in a practical light, extremely unreasonable and unjust. And amongst progressive Hindus, who are likely or think themselves likely to make fortunes of their own, I am sure the feeling would be as strong against it, but for the veneration in which they hold their law because it is rooted in their religion, as amongst Mahomedans who have no such reason for, I will not say venerating but, tolerating it. Such Hindus would, I expect, be found to have taken steps comparatively early in life to protect themselves and their earnings against the application of this paralyzing doctrine by effective partitions or releases. But the Khojas and Memons, who really do not know whether, as the law stands, they are exposed to this peril or not, cannot so protect themselves. Under their own law, which may for all they know govern them here, the releases would be waste paper. Of course they could effect partitions, but where the father knows perfectly well that starting on an inherited capital, say a nucleus of Rs. 500, he has entirely by his own unaided

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skill and exertions accumulated a fortune of twenty lacs before any of his sons were of an age to give him any assistance or be more than a cause of expense to him, it is not surprising that he should be reluctant to invite the equality of sharing, implied in every partition under the Hindu law of the joint family. Neither can he make a will with any confidence that it will not be set aside, as in *Mahomed's case*(1), on the ground that the whole of his fortune is traceable to its "nucleus" and must therefore be regarded as joint ancestral family property. It is hardly to be expected that in the prime of life he will give away the whole of his property, seemingly the only means by which he can assert his individual ownership at all effectively. So things are allowed to drift until on the father's death a bounteous harvest of litigation is reaped. That this state of affairs is indefensible and calls aloud for remedy, no one who is competent and acquainted with the subject is likely to deny. Both Sir Michael Westropp and Sir Charles Sargent are quite sensible of the inconveniences, to use no stronger term, to which the case law has exposed these industrious, energetic and successful people. But nothing is done, and nothing seems ever likely to be done, as long as each case follows (and usually enlarges the scope of) those which have gone before. The most eminent Judges have advocated legislation. Why? Because they know and feel that in the existing state of the law it imposes limitations and real hardships on the sects so brought under it which grow more and more intolerable. My examination of the case law however shows that rightly understood and analysed, it need never have gone the length to which here and there it has been thought to be driven. But I am not hopeful at this late hour of getting undone by judicial decision what has so effectually been done by means of the same

(1) (1885) 10 Bom. 1.

instrumentality over the last three quarters of a century. But I see no reason why an evil, now generally recognized as such and seen to bulk larger and larger over the commercial activities of these sects, should not be at any rate very substantially reduced and henceforward kept strictly within bounds until legislation comes to our aid, without really transgressing any of the principles established by judicial decisions. Doubtless it would be necessary to neglect the dicta even the decisions in some later cases but inasmuch as those dicta and the decisions which flow from them are professedly based on what has preceded, if it can be shown that they are to some extent ill founded and go far beyond what they aim at enforcing, I do not think it would be any violation of the respect due to the decisions of eminent Judges, and the venerable maxim *stare decisis* to neglect them in future

And yet it needs but little alteration, or addition, to convert the law as now generally understood to govern Khojas and Memons, so that it would be robbed of its most objectionable and questionable features, and would probably be acceptable to the intelligent portion of those communities. And I believe that this can be done without violating any principle to be found in any of the decisions. I would suggest that the proper way to approach every question of the kind is this :—

1. Where Mahomedans are concerned, the invariable and general presumption is that they are governed by the Mahomedan law and usage. It lies on a party setting up a custom in derogation of that law to prove it strictly.

2. But in matters of simple succession and inheritance it is to be taken as established that succession and inheritance among Khojas and Memons are governed by the Hindu law "as applied to separate and self-acquired property".

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The words between inverted commas would take the whole sting out of the case law and effectually prevent its further extension in all directions upon the basis of the Hindu law of the joint family having been established to be the law of Khojas and Memons. It is indisputable that that never has been established as a custom adopted by these sects; no attempt indeed to prove it collectively as a custom has ever been made, nor, I should imagine, could be made in a given case, without a disproportionate expenditure of time and money. The mischief, I feel so deeply and have attempted to bring into clear relief, is attributable to the sudden inversion of the major premiss, where any point proper to a Hindu joint family has been directly or indirectly in controversy. The decisions have not proceeded step by step as upon every statement of principle in every one of them they were bound to do, thus proving gradually the adoption as a custom of this or that point of the law of the Hindu joint family. The process has been reversed, and from the proof of two customs supposed to be drawn from that large and complex law, the Courts went *per saltum* to the conclusion, that the whole law with all its legal incidents and consequences had been proved as a custom to govern Khojas and Memons. I have endeavoured by a logical analysis to expose the viciousness of this process of reasoning. And I hope that I have succeeded. If I am right the result at the present day would be this—that no question at all could be made of nucleus or joint family property or the illegality of disposing by will of ancestral property, unless the person alleging any or all these points was prepared to prove that they had been adopted as a part of the customary law of the Khojas and Memons. And it is, I believe, certain that any attempt of that kind made today would be foredoomed to failure. Whatever may or may not be the customary law of rural Khojas

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and Memons in Cutch, Kathiawar and Guzerat, few indeed of those wealthy trading communities in the town and island of Bombay would be ready to support any such customs. And admitting for the sake of argument that a century ago, when for the most part the Khojas and Memons in Bombay were petty hucksters, they had brought with them from their seats in the remoter parts of the Presidency, customs of that kind, those customs must long since have fallen into desuetude with the growing accumulation of personal wealth. *Abraham* v. *Abraham*[1] is an authority, were any needed, for the right of individuals or groups thus to abandon as well as to adopt customs, when in the former case those customs were found to be detrimental to their individual or social welfare. If this Court were to accept this view for the future the administration of the law would be immensely simplified, reduced from chaos to order, and a stop put to a great volume of the most protracted and expensive litigation. Applying my principles to the present case, for example, it will be seen at once that the plaint discloses no cause of action at all, unless the plaintiff alleges and is prepared to prove two or three salient features of the Hindu law of the joint family as customs adopted by the Khojas of Bombay. Even as it is, many of his prayers are, on the face of them, bad. He cannot for instances have the declaration he asks as to the nature of the property and his rights therein; he cannot sue for partition; he might possibly ask to have the gift by Datu in 1902 to his son Ismail annulled on the analogy of Article 126 of the Schedule to the Limitation Act and the general principle of the Hindu law prohibiting alienations of joint family property by the father. But even there it appears to me that the question does not really arise upon any plea of simple succession and inheritance, and is, there-

(1) (1863) 9 Moo I A. 195

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fore, beyond the true scope of the cases. So that here again we would have to allege and prove the special custom. But there is no allegation of custom and no attempt has been made to prove a custom. Under the Mahomedan law he would have no right, I apprehend, to sue for cancellation of the release of 1879. Nor under the Hindu law properly restricted to matters of succession and inheritance. Indeed under the Hindu law it is extremely doubtful whether he could sue directly for any relief under Article 91 in respect of the release. He might contend on the authority of *Wasantrao* v. *Anandrao*[1] that his interests and rights were not affected by it. But if they are, a very nice question of limitation arises which I shall presently consider. Here I will sum up the result of the foregoing part of this judgment thus—in my opinion, after an exhaustive examination of the whole law on the subject, this plaint discloses no cause of action and ought to be dismissed. But I can hardly hope that what will be thought by many to be so sudden and revolutionary a decision will be allowed to stand. Scott, J., in *Mahomed's case*[2], while evidently doubting the suitability of the law he felt bound to apply, supports the need of continuity in judicial decisions by the usual argument, that many valuable rights must have vested already under the decisions of the Courts prior to 1886 and that more mischief would be done by disturbing them than by any attempt to put the law on a new, correct logical basis. I believe with respect that the balance of expediency (though that is a consideration with which Judges have nothing to do) would be heavily the other way. But my real point is that the law never has been settled as in 1885 Scott, J., believed that it had. Thenceforward the cases are shown not to have affirmed a settled principle but enormously to have extended in

(1) (1904) 6 Bom. L. R. 925. (2) (1885) 10 Bom. 1.

practice, what never was, but was believed to be, a settled principle.

I will next deal with the plea of limitation. Various arguments may be used and need to be considered under this head. The admitted fact being that in 1879 Abdulla passed the release in virtue of which, assuming this to have been a joint family under the Hindu law, he went out of it and purported to take his wife and infant son, the 1st plaintiff, with him. It is clear that on any view of the law, whether we apply the Hindu law *in toto* or not, neither Abdulla nor his afterborn son Aziz are entitled to any of the reliefs claimed in the plaint. For the plaintiffs cannot have it both ways. They cannot contend that for the purpose of disposing of this release they will invoke the Mahomedan law, but for all other purposes of the suit they will invoke the Hindu law. If, to get rid of the release, they contend that such a release is under Mahomedan law no more than the transfer of a *spes successionis* (vide the case of *Sumsuddin* v. *Abdul Husein*[1] decided by the late Sir Lawrence Jenkins and myself) then, also under the Mahomedan law the suit discloses no cause of action in the plaintiffs. Abdulla might have sued to have the release set aside under Article 91 for fraud, failure of consideration, etc., but that he must have done within three years or not at all. No son under the Mahomedan law takes any vested interest at birth so that the plaintiffs would have no right to sue independently to have their father's release set aside, and under Article 91 read with section 7 the plaintiffs (even assuming that they had any such right) would clearly be time-barred. This, I believe, is what Tyabji, J., meant in his judgment in *Wasantrao* v. *Anandrao*[2] and with great respect I doubt whether the force of his point was fully apprehended by the

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learned Judges of appeal. But that was a case of Hindus under the Hindu law and considerations applied which could not apply under the Mahomedan law. So that for the purpose of this argument I must suppose that the legal rights of the plaintiff in this respect are governed by the Hindu law of the joint family. (I will here say once and for all that although in the rest of this judgment I shall be obliged to speak as though I accepted the rule that every right put in controversy by these pleadings was governed by the Hindu law of the joint family, I do not accept that rule, for the reasons already given at length.)

The close resemblance between this and *Wasantrao's case*[1] is at once apparent. The plaintiff's contention is that it is governed by and cannot be distinguished from that case. For my present purpose it is enough to say, though I shall be obliged to go further into the case of *Wasantrao* v. *Anandrao*[1], that the learned Judges of appeal, whose decision was confirmed by the Privy Council, were of opinion that because Anandrao took a vested interest at birth in the joint family property, he did not claim through his father, was not bound by his father Madhavrao's release of 1889 and need not have sued within three years, or at all to have it set aside. But for that opinion, I cannot see how the conclusion reached by Tyabji, J., that reading section 8 of the old Limitation Act (now section 7) with Article 91 the plaintiff's claim was time-barred, could be avoided. For taking the release to have been a partition so far as Madhavrao was concerned (and this appears to have been the view adopted by Jenkins, C. J.) it is hard to say that Madhavrao, in a suit to have that partition set aside on behalf of himself and his minor son, could not have given a valid discharge without the concurrence of the latter. In all matters of that sort a Hindu

[1] (1904) 6 Bom. L. R. 925.

father fully represents his minor son, and with the utmost respect, I do gravely doubt whether the question being whether a partition effected by the father for himself and his stirps ought to be set aside for any reason, the father might not bring the suit and in respect of its result give a valid discharge both for himself and his minor son without the concurrence of the latter. If that be a correct view then time began to run against Anandrao as well as Madhavrao from the date of the release. In the view taken by the Appeal Court, however, the Article which applied was Article 127. And it is contended here, that that Article applies and that the plaintiffs, not having been excluded to their knowledge from the joint family property more than twelve years before suit, are in time.

I wish to make a few observations upon the case law which has grown up in this Presidency about Article 127. Formerly that article was restricted to "Hindus" but in the Act of 1877 "person" is substituted for "Hindu". I do not remember a single case in our books in which the very obvious reason for that change has been noticed. Generally the Judges have read the changed word as expressing the intention of the legislature that any person whether Hindu, Mahomedan, Christian, Parsi or Jew might have the benefit of the Article. And so of course he might, provided its other requirements were complied with. But surely a curious process of reasoning is exhibited in the general statements to be found in some of the earlier cases, that the Article now applies to Mahomedans as well as Hindus, without a pause upon the essential requirement of the whole Article, namely that the property in respect of which relief under it is sought must be "joint family property". And outside the Hindu law "joint family property" is unknown. The change, I submit, must have been rendered necessary by the case law I have been

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examining, and was designed to include Khojas and Memons, who although not "Hindus" might under the decisions in certain circumstances hold "joint family property" in the Hindu sense. There is no other possible case in which anyone but a Hindu could hold "joint family property" at least none that I know of; and if there are any, they, like the cases of the Khojas and Memons (and later the Molesalami Girassias of Broach and Sunni Bohras of Dhandhuka), must have been proved as special customs. Thus the application of Article 127 is really not extended, as our Court has frequently seemed to think, to Mahomedans generally, or to any other class generally, irrespective of the possibility of such Mahomedans or members of that other class, holding "joint family property". Where can any such persons be found? As the decisions relating to Khojas and Memons were understood, it is plain that upon an unimpaired descent from father to sons, the latter might (in the common opinion, would) hold the property as members of a Hindu joint family, and property so held would be "joint family property" within the meaning of the Article; but no other. The point is really of considerable importance in view of the current of decisions in this High Court, with which (and for obvious reasons) no other High Court in India agrees.

I will take the latest case with which I am acquainted, first, *Fatma Boo* v. *Ghisan Boo*(1) decided by the present learned Chief Justice and Batchelor, J. The head-note is: "A suit by the daughter of a deceased Mahomedan to recover her share in his property is governed by Article 127 of the Limitation Act, 1908." This clearly could not be a Khoja or Memon case, since the leading case in 1847 decided that under a special custom of those sects a daughter was excluded from the

(1) (1909) 11 Bom. L. R. 1083.

inheritance. So that if what I have just said above be rightly reasoned, there could have been no question of "joint family property" in the case. The learned Chief Justice says: "The question in this case is whether the Article 127 of the Limitation Act can apply to a suit by the daughter of a deceased Mahomedan to recover her share in his property. It was decided under the Act of 1877 by an Appellate Bench of this Court in 1885 (by Sargent, C. J., and Birdwood, J.) that it can so apply, and that decision, so far as we are aware, has been followed in Bombay for the last twenty-three years. It is a decision which is binding upon us; and we, therefore, hold that the suit falls within Article 127." Now it is clear that this decision need not be taken as expressing the considered opinions of the learned Chief Justice and Batchelor, J, but as attributable to the maxim *stare decisis* It is founded expressly on the decision of Sargent, C. J., and Birdwood, J. (not I believe reported, but to be found in the Printed Judgments of 1885)[1] Although Judges would always desire to treat everything falling from so eminent and learned a Judge as Sargent, C. J, with the utmost respect, it is permissible in a theoretical discussion of the law to examine that decision critically. Sargent, C. J., said: "It remains only to consider whether the claim of Gulam Hussein, as a residuary to one-ninth of the compensation awarded in respect of lots A, C, E and G, and the claim of Najib-un-nissa as one of the legal sharers, to one-sixth of such compensation, are barred by time." I pause to point out that from this statement it is clear that the Hindu law was not being applied, in matters of succession and inheritance, to the parties to this suit. One of the claimants was a woman, and she claimed as a sharer. The case was then being dealt with under the Mahomedan law, and that law knows absolutely nothing of "joint family property". The learned Chief

(1) *Sayad Gulam Hussein v. Bibi Ancarnisa* (1885) P. J. p. 170.

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Justice proceeds: "The property left by Bakar Ali became divisible, on his death, among those members of his family, who were entitled to shares, according to the Mahomedan law or were residuaries. Till it was divided it was, we think, 'joint family property' within the meaning of Article 127 of Schedule II of the Limitation Act of 1877." And after noting the changed language: "It is not necessary, therefore, to restrict Article 127 of the present Limitation Act to suits by Hindus. And the question . . . is, whether, before the institution of proceedings under Act X of 1870, the claimants Gulam Hussein and Najib-un-nissa had been excluded, to their own knowledge, from lots A, C, E and G for a period of twelve years."

The material sentence in the judgment is: "Till it was divided we think it was 'joint family property' within the meaning of Article 127." I submit with great respect that that opinion is untenable upon any view of the Mahomedan law. It could not even be argued that the heirs, sharers and residuaries took over each other by survivorship, which is the crucial test of "joint family property". On the death of a Mahomedan intestate, his estate could not in any conceivable circumstances, unless it is by a special custom supposed to be governed by the Hindu law, be "joint family property". It is what it always was an undistributed estate, to be taken in severalty by the heirs, sharers and residuaries.

The view taken by the Bombay High Court, which is based on this decision of 1885, has not been accepted by the other High Courts: *Amme Raham* v. *Zia Ahmad*[1]; *Patcha* v. *Mohidin*[2]; *Mahomed Akram Shaha* v. *Anarbi Chowdhrani*[3]. Probably in those parts of India no groups of Mahomedans have been brought under

(1) (1890) 13 All 282. (2) (1891) 15 Mad 57.
(3) (1895) 22 Cal. 954.

the Hindu law of the joint family, and the Courts therefore very naturally declined to hold that property held under the Mahomedan law could be "joint family property" or that Article 127 could apply in the case of any relief sought in respect of it.

The two cases cited by Sargent, C. J., viz., *Musst. Khyroonissa* v. *Salehoonissa Khatoon*[1] and *Achina Bibee* v. *Ajeejoonissa Bibee*[2] were both decided under the Act of 1859. The words of the section are different from those of Article 127 of the present Act, although no doubt the suits contemplated were suits for movable or immovable property on the ground that it was joint family property. But the point upon which I rest my conclusion does not appear to have presented itself to the minds of the Judges in either of those cases. Thus in *Khyroonissa's case*[1] the Court says: "The words used in the clause are 'joint family property' and 'property alleged to be joint', which are the usual terms with reference to joint Hindu families. But we see no exception as to Mahomedan families, or why their respective rights by inheritance should not come under limitations prescribed generally against parties not trustees as well as trustees." It is submitted that no exception was necessary for the simple reason that no joint family property exists among Mahomedans. *Achina Bibee's case*[2] appears to have been decided on the ground that the party against whom limitation was pleaded was proved to have been in "joint possession" within the statutory period. That might as well have been decided under Article 144 as Article 127 of the present Act. All that bears on the present argument is this passage :—

"In special appeal it is urged that this suit is barred by the provisions of clause 13, section 1, of Act XIV of 1859, inasmuch as the plaintiffs have failed to show any act of possession by any payment on the part of Gholam

(1) (1866) 5 W. R. 238 (Civ.). (2) (1869) 11 W. R. 45 (Civ.).

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Ahmed . . but the inference he has drawn from the fact of these ladies living with Gholam Ahmed, and being supported by him from the proceeds of the property, is a proper and correct one. It would be difficult to know what other evidence could be given of joint possession by women in the position of the plaintiff's mother in this case, living as she was with Gholam Ahmed, who, as the sole male representative of the family, had the sole charge and management of the property."

In *Abdul Kadar* v. *Bapubhai*(1) Parsons, J., said :—

"The reason assigned for the refusal by the Subordinate Judge is that the Court-fee paid is only sufficient to cover plaintiffs' one-third share in the property. No more, however, is ever paid in any suit for partition, and we think that it was quite in the power of the Judge to have ordered the defendant to pay the necessary Court-fee on his share as a condition precedent to his obtaining his share. The District Judge refused because this was not a suit for partition of joint family property as known to the Hindu law, but a suit by Musalmans for their share of an inheritance. In this Presidency, however, a suit for partition of an inheritance by Musalmans is hardly distinguishable from a partition suit by Hindus."

The learned Judge goes on to say that the plaintiff was at any rate entitled to the relief by way of ordinary administration suit, and there I entirely agree with him. It is the last sentence I have quoted which with respect I think to be far too broadly stated. I was told in the course of the argument that that passage was frequently cited, and always seemed to pass unchallenged, and with approval. Sweeping dicta of that sort, for which it might be difficult to find any solid basis, tend to add to the confusion in which the precise extent of the applicability of a part of the Hindu law to particular groups of Mahomedans in this Presidency is involved. In *Bavasha* v. *Masumsha*(2), Parsons and Candy, JJ., purporting to follow *Sayad Gulam Hussein* v. *Bibi Anvarnisa*(3) said: "The First Class Subordinate Judge, A. P., erred in holding that Article 127 of the Limitation Act, 1877, applied only to

(1) (1898) 23 Bom 188. (2) (1889) 14 Bom 70.
(3) (1885) P. J. 170.

Hindus, and so did not govern this suit" (I note that this is a *non sequitur*. The Article may apply to others than Hindus and yet need not apply to all who are not Hindus, a curious logical fallacy which seems to run through most of the decisions), "which is one by a Mahomedan to enforce his right to a share in the property left by his father and to recover that share by partition. The case of *Sayad Gulam Hussein* v. *Bibi Anvarnisa*[1] is a distinct authority that 'joint family property includes property left by a deceased Mahomedan and divisible among his heirs until it is divided.'" (Surely such property is not "joint family property": but all sharers are until division tenants-in-common.) But where there is a tenancy-in-common it may very well be, as was held on the facts of this case, that no tenant-in-common has been excluded so as to start limitation against him, under Article 142 or 144. The whole of the law was very elaborately dealt with by Batty, J., in *Abdul Kadir* v. *Mahomed*[2], and that learned Judge appears to me, speaking with all respect to what may be thought the contrary opinions of other learned Judges, to have laid down the true criteria. But succinctly my submission is that, because Article 127 is not restricted in terms to Hindus, it does not follow that it necessarily extends to everyone who is not a Hindu. The criterion of its applicability is the character of the property. That property must be "joint family property" and no such property is known to the law outside the special Hindu law of the joint family. Some who are not Hindus may hold property under that special branch of the Hindu law, but before Article 127 can be applied, it must be shown that they do. Here, however, it must be admitted that according to the general acceptation the parties to this suit belong to a class who are governed by the Hindu law of the

(1) (1885) P. J. 170. (2) (1903) 5 Bom. L. R. 355.

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joint family, so that, apart from other considerations, no difficulty need be felt in applying Article 127 if that be necessary to save limitation. But it is also urged that inasmuch as the release of 1879 binds not only the maker but his children, this suit must fail as long as that release stands. To this the plaintiffs have two answers. First, they contend that they are not bound by the release. Having it set aside, therefore, so far as it may affect them is merely incidental and subservient to the substantial relief they claim. Next, that they only became aware of the existence of the release within three years of suit The second contention may be summarily dismissed. On the evidence I hold it established that Jan Mahomed knew of the release many years ago, certainly before he went to Rangoon in 1902. And as to Aziz, I fail to see what interest he can have in the suit, or in what right he is entitled to ask to have the release set aside. It must be held binding on his father Abdulla, who, though he now alleges fraud, undue influence, etc., has never taken any steps to have the release set aside. But if binding on him, then, looked at in the light of the Hindu law, such a release would surely take him out of the family from the date of its execution. Aziz was not born till about 1893 thirteen or fourteen years after his father had gone out of the family, and become, as Jenkins, C. J., put it in *Wasantrao's case*[1], "dead". Now a dead man cannot have any more children, so that from the point of view of the members of this "joint family" in the Hindu sense, Aziz simply does not exist.

The first line of argument raises difficulties, which are to be found in numerous analogous cases in the books. I give, merely as an example, *Abdul Rahim* v. *Kirparam Daji*[2], where it was held by Birdwood and Parsons, JJ., that Articles 91, 92 and 93 and section 2 of

(1) (1904) 6 Bom. L. R. 925 (2) (1891) 16 Bom. 186 at p 189

the Limitation Act apply only to suits brought expressly to cancel, set aside or declare the forgery of an instrument but they do not apply to suits where substantial relief is prayed, and where the cancellation or declaration is merely ancillary and not necessary to the granting of such relief. In the case the documents impeached were all executed by a deceased woman by way of gift, etc., and therefore the case does not illustrate as clearly, as some, the principle I wish to arrive at. The general statement in the head-note is unexceptionable, but it leaves in doubt the fundamental question when the cancellation of a document is necessary, and when it is not necessary but, to quote the usual terms only incidental, ancillary or subservient to the substantial relief claimed. Where the instrument is executed by the plaintiff himself and would, if allowed to stand against him, effectively defeat his claim, it becomes a little difficult to maintain, that although the claim is for substantial relief, the prior cancellation of the instrument is only ancillary or subservient to that relief. And the inclusion of such Articles as 93 and 94 in the schedule may be thought surprising. Ordinarily a person is not bound to take notice of forgeries, or to ask the Court to be relieved against them. As these Articles are there, however, it would always be open to argue that a plaintiff who happened to know that a document had been forged, but took no steps to have it declared a forgery within the term prescribed, would be barred in a suit after that period had expired from disputing the genuineness and binding effect of the document. Suppose, for example, that A knew that a conveyance of part of his property to X had been forged in 1910 but took no steps to have the conveyance declared a forgery. In 1914, let us suppose, X gets into possession of the property so conveyed A brings a suit in 1915 to recover his property and is confronted with the forged conveyance of 1910. What is the

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position? If the conveyance be genuine and binding upon him he has no case; if he tries to show that it is a forgery he is told that he is time-barred.

I will now give an example of paramount authority, the case of *Petherpermal Chetty* v. *Muniandy Servai*[1]. As to the point raised on the Indian Limitation Act, 1877, "their Lordships are of opinion that the conveyance of the 11th June 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims." And the plaintiff was allowed to bring his suit under Article 144. Pushed to its logical conclusion that decision of the Supreme Court wipes Article 91 out of the schedule, for there is no conceivable case in which a plaintiff could obtain the relief contemplated by that Article, unless to that extent at least the instrument were found to be "inoperative" against him. In the particular case their Lordships were dealing with, the plaintiff had sold *benami* in 1895 to defraud a creditor. It was found that the creditor had not in fact been defrauded, so that the maxim "let the estate lie where it falls" did not apply. But it is equally clear that so long as the sale of 1895 stood unchallenged it would be an effective bar to the plaintiff's claim to recover the property conveyed. In a suit under Article 91 brought within three years of the sale, the plaintiff might have been allowed to show its true character and so have declared in 1898 what was finally upon trial found in 1908 that the instrument was "inoperative" against him and therefore should be cancelled. Not having done so, but for this decision, it might have been thought that he would have been precluded from averring "inoperative-

(1) (1908) 35 Cal 551.

ness" on any ground at all against the sale of 1895 after the expiration of the period of limitation prescribed by law on that behalf. It is extremely difficult to reconcile a decision of this kind in principle with such a decision as that where there has been an adoption which if made and valid would defeat a claim, and that adoption has not been challenged within the statutory period, it is an effective answer to a suit brought under, say, Article 141 for possession. I submit with great respect that the true rule which is also of universal applicability is this; where the existence of a document if valid and binding on a party would defeat his suit to recover possession of any property, he must sue under Article 91 for the cancellation of that document within three years. (I am not concerned with cases of forgery provided for in Articles 92 and 93, and of course the rule I have thrown into very general words might be more precisely laid down, but it serves to express my meaning.)

For it appears to me that if Article 91 is to have any effect at all, that effect would be that documents not impeached under it will not be open to impeachment generally in a suit to recover possession of property. In applying the rule practically, obvious distinctions might be drawn between documents made by the party suing himself or his representative in interest, and others. The latter was the case before Birdwood and Parsons, JJ., and though I think they laid down the law much too broadly in their judgment, no exception need be taken to the decision confined to the facts of the case. Here then the question would be whether the release of 1879 is binding on the plaintiff 1? In other words, whether having it set aside or cancelled is necessary to the success of the further substantial relief he seeks, or merely ancillary and subservient to it? Upon the authority of *Anandrao's case*, which I will now briefly consider, the plaintiff may fairly contend that he is not

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bound by the release, and that it is immaterial to his present claim whether it be cancelled or not. If he is right there, it would be unnecessary to consider one of his prayers, which is for a declaration that he is not bound by the release, and therefore that as far as he is concerned it may be cancelled. The plaintiffs here chiefly rely on the case of *Wasantrao* v. *Anandrao*[1]. The material facts may be summarized thus: Kashinath the first bequeathed all his property held to have been joint ancestral family property by will to his grandson Vithoba, to the exclusion of another grandson Bajirao. Vithoba gave the entire property to Kashinath the second, who at that time had two sons Ganpat and Madhavrao. Kashinath the second willed away this property. In 1889 Madhavrao who had a son, Wasantrao, executed a *release* in favour of his father Kashinath for Rs. 5,000. The plaint in the suit was sworn on the 5th December 1901 and came on for trial before Tyabji, J., who held the claim barred by limitation and dismissed the suit. On appeal before Jenkins, C. J., and Batchelor, J., it was held (1) that the property notwithstanding the wills and gifts was joint ancestral family property in the hands of Kashinath the second, at the time Madhavrao executed the release. (2) That inasmuch as Wasantrao took a vested interest at birth in the whole joint ancestral family property, he could not be bound by his father's *release*, for which the consideration paid was wholly inadequate. (3) That the suit was not barred by limitation as neither Article 126 nor Article 127 read with section 8 nor Article 91 read with section 8 could bar the plaintiff's suit. Article 127 was held to apply, and it was found that the plaintiff was not excluded to his knowledge from sharing in the joint family property for more than twelve years before suit, so that he was entitled to his share which (as I understand the

[1] (1904) 6 Bom. L. R. 925

judgment) was held to be one half. This decree was confirmed on appeal to the Privy Council. Upon it two questions arise. 1. How far can it be carried beyond its own facts even where it is sought to be applied as a principle to cases arising between Hindus? 2. How far if at all is it applicable to the cases of Khojas and Memons? I should at the very outset note, what never appears to have engaged much attention since, namely that Madhavrao's release in this case could not possibly be interpreted as a partition. I have sent for the paper book and read that release, and it is perfectly clear that Madhavrao was convinced, or professed at the time to be convinced, that the property in his father's hands was not joint family property at all, and that he had no right in it This was not unnatural in view of the admitted facts that it had once been bequeathed by will (apparently without any protest on the part of the disinherited grandson) to Vithoba, one of two grandsons, who, had the property been joint ancestral family property as now held, would have been entitled to equal shares in it And that subsequently the whole of it had again been given by Vithoba to his only son Kashinath, although it appears that at that time Kashinath had male issue, who again if the property were joint ancestral family property, would have acquired an interest in it at birth. The history of the property is quite inconsistent with its having been joint family property, and no wonder Madhavrao was convinced that he had no interest in it, and so accepted a relatively small sum as the price of undertaking on behalf of himself, his heirs, executors and assigns not to put forward any claims to it. In the light of other decisions it is highly important to bear in mind what the real character of the release was. I will only observe on the argument used by the learned Chief Justice upon Article 126 that he appears to have overlooked what I suppose was in the

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(1) (1908) 35 Cal. 551.

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mind of the learned trial Judge. The gift by Vithoba to Kashinath was an alienation in the strictest technical sense, or purported to be, of the rights of Ganpat and Madhavrao both alive at the time. If in fact Kashinath had held adversely to them under this deed of gift it is hard to see why Article 126 should not have applied to the cases of Ganpat and Madhavrao, and later why, read with section 8, it should not have barred Wasantrao. The learned Chief Justice asks who was to sue to have this alienation set aside, the donee? Certainly not; but those members of the family who were injuriously affected by it, namely the two grandsons Ganpat and Madhavrao. Suppose it had been a valid gift, its effect would have been to leave Kashinath the second free to dispose of the entire property, irrespective of the vested interests of his sons. So viewed, it is not easy to distinguish this from any other alienation. It is true that Article 126 is restricted in terms to an alienation by a Hindu father, whereas the only persons who could here be aggrieved were grandsons. But I do not think that the learned Chief Justice meant to make that the ground of repudiating the applicability of that Article to the case.

As to the binding effect of the release on the plaintiff Wasantrao the learned Chief Justice says (page 913): "To the first my answer is that the release does not bind Wasantrao; he was born at the time and I cannot find in the transaction those conditions which would make the release effective against and operate on the independent interest acquired by Wasantrao at his birth." I note that here it is very clearly implied that such conditions might exist, so that it is necessary always to keep this judgment very strictly to its own facts. And in dealing with the third of Tyabji, J.'s points, the Chief Justice again grounds his decision on the independent right of the plaintiff. In the end

Wasantrao was decreed half the joint family property, as though Madhavrao by his act of 1889 had, so far as the joint family was concerned, ceased to exist. As, however, Kashinath had paid according to the release Rs. 5,000 for Madhavrao's share, and Madhavrao was held bound by that release, the logical result, it is submitted, should have been that Wasantrao took at most only one quarter, the other quarter which would have gone to Madhavrao having been bought by Kashinath the second. But a careful consideration of the case, as a whole, shows that it by no means concludes the defence here. It does not go the length, as is sometimes supposed, of holding that a disadvantageous partition by a father will not bind his sons, although the only ground of the decision actually stated might be pushed as far as that. For suppose that in this case the release of 1889 had in effect been a partition, then either the plaintiff Wasantrao would have been bound by it, or no minor could ever be held bound by a partition effected by his father. There must be numerous cases where at the time of the partition the property may be worth say Rs. 3,000 and the partition being between three brothers each of whom has minor children, the share of each would be worth Rs. 1,000. By the time the minors have attained majority it may be that two out of the three shares made many years before have increased in value to a lac. But the minor son or sons of the third partitioning member could hardly be heard to say, on that account, that they were no parties to the partition, that they had acquired an independent interest by birth, and therefore called for a fresh partition now that parts of the original joint family property had increased so much in value. The truth is that while the judgment in *Anandrao* v. *Wasantrao*(1) rests almost exclusively upon the theory

(1) (1907) 9 Bom. L. R. 595.

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that every member of a joint family acquires a vested interest in the entire property at birth, it makes no mention of the equally important principle of the Hindu law, that for purposes of partition, etc., minor members are fully represented by the head of the stirps to which they belong. Thus, but for special considerations which the learned Chief Justice plainly had in mind, he might have held that the release of 1889 amounted *pro tanto* to a partition, and had he come to that conclusion there can be little doubt that he would also have held that Wasantrao as well as Madhavrao was bound by it This was the principle of later decisions such as that in *Chabildas's case*[1] (although the release was referred rather to the category of family arrangements than to actual partition); *Umed Babar* v. *Khushalbhai*[2] where though *Wasantrao's case*[3] was referred to in the argument it was not noticed in the judgment of the Court. The latter is an instructive example of the principle applicable to *quasi*-partitions if I may call them so. The learned Judge, Chandavarkar, J., says (page 401):—

What is called by the parties a relinquishment by the 2nd defendant's father was in substance a partition of the family property between him and his coparceners and it is none the less a partition within the meaning of that term in Hindu law though instead of receiving his share of the property as it existed then the 2nd defendant's father received the money value of it. It is urged that that partition is not binding on the 2nd defendant because the latter was a minor then and the deed Exhibit 38, contains no express words to show that his father and his coparceners intended to include the 2nd defendant's share in his father's share. But the rule of Hindu law is that at a partition among the members of a joint family each member is presumed to represent not only himself but also his sons and the son takes his share through his father as being included in the share allotted to his father."

And to much the same effect is *Chabildas's case*[4], decided on appeal by the same learned Judge, thus:—

Then comes the question whether his two sons (the 2nd and the 3rd appellant) and the son of his deceased brother, Cursondas, are also equally

(1) (1909) 11 Bom L. R. 606.

(2) (1909) 11 Bom. L. R. 396.

(3) (1904) 6 Bom. L. R. 925.

(4) (1910) 12 Bom. L. R. 621 at p. 62[illegible]

bound by it. It is argued that they are not, on the authority of the judgment of this Court in *Wasantrao* v. *Anandrao*[1] confirmed by the judgment of the Judicial Committee of the Privy Council in *Anandrao* v. *Wasantrao*[2]. These judgments do not lay down the broad proposition that in no case in a joint Hindu family, consisting of a grandfather son, and grandson, the last can be bound by a release of his right to a share in the ancestral estate executed by the son. No doubt in the concluding part of their judgment the Privy Council point as the ground of their decision, to the rule of Hindu law that the grandson has a right to the estate independent of the father; but they go on also to remark that the late Chief Justice of this Court who delivered its judgment has rightly applied the principles of Hindu law to the facts of the case. We must, therefore turn to the latter judgment to see how the rule of Hindu law in question was applied by this Court to the facts before it in *Wasantrao* v. *Anandrao*[1]. The Chief Justice holds the grandson not bound by his father's release because of the circumstances of the transaction. In each case where the question arises it must be decided on its own facts. It is true that a son takes a vested interest by birth in ancestral estate, but it is not true that because he has that independent existence, he is absolutely independent of his father where the two are joint and where the son is a minor. The father has the right in certain cases and under certain conditions to alienate the estate and bind his son by the alienation; in a partition among the members of a joint family, of which the father and the son are coparceners the father represents both himself and his sons, and in all transactions the father has power to act on behalf of the son as well as on his own, especially where the son is a minor."

I conceive that the true principles of the Hindu law which are required for the decision of this case, assuming the Hindu law to apply, are here correctly stated. And again I repeat that the release in *Wasantrao's case*[1] could not in any view be regarded as a partition or even quasi-partition, since the ground of it was that the releasor did not believe that the property released belonged to a joint family of which he was a member. It was therefore no more than a personal undertaking, not even in the nature of a family arrangement, stretching those words to the utmost; and as such it could hardly be held binding upon the independent interest of minor children. It is true that Madhavrao purports

(1) (1904) 6 Bom. L. R. 925. (2) (1907) 9 Bom. L. R. 595.

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to covenant on behalf of himself, his heirs and executors and assigns, but having regard to the nature of the covenant and the expressed reason for it, no principle of the Hindu law of the joint family need be invoked either for its interpretation, or to attach to it its legal consequences. To bind a minor by such a covenant it surely would be necessary to show that he claimed through his father, which the minor in that case did not. Nor in such an act was the father representing, and so binding his son as he would in a partition or quasi-partition, or reasonable family arrangement. On the other hand it will not do to carry that decision the length of saying that minor sons never can be bound by a father's release, if in the nature of a partition, quasi-partition, or reasonable family arrangement. So that if the Hindu law is to be applied to the parties here in determining the effect of the release of February 1871 it will have to be applied as indicated in the two decisions last cited and not with any special reference to *Wasantrao's case*[1]. Having thus far attempted to open the way to a clear view and grasp of principles, it remains to apply those principles to the facts of this case.

But I must cite one more decision which has a direct bearing on the *obiter dictum* of Sargent, C. J., in *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy*[2] that although among Khojas a son cannot enforce partition during his father's life-time, he may without inconsistency restrain his father from alienating any part of the joint family property. I commented on that while criticizing the whole judgment but had not this case in my mind; I have since found it. In *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*[3] the Judicial Committee of the Privy Council lay it down, that "In such a raj the son is not a co-sharer with his father. Property in

(1) (1904) 6 Bom. L. R. 925. (2) (1889) 13 Bom. 534.
(3) (1888) L. R. 15 I. A. 51.

ancestral estate acquired by birth under the Mitakshara law is so connected with the right to partition that it does not exist independently of such right." That is to say that because the raj was impartible, the son was not a "co-sharer" in the sense in which every member of a joint Hindu family is a co-sharer. Applying this emphatic pronouncement to the case of the Khojas what is the result? Since no Khoja son can enforce a partition, it follows that he cannot be a co-sharer. And if that be so, the plaintiffs could not have any of the reliefs prayed for in this suit. That is strong corroboration of the views I expressed in summing up my review of the case law, which has step by step applied the Hindu law of the joint family to Khojas and Memons.

As to the gift by Datu to Ismail in 1902, no question of limitation arises. As to the release of 1879, I am, owing to the state of the authorities, in some doubt whether I ought to give effect to my own opinion, an opinion I have held unshaken for many years, that in this and all similar cases a party, who does not take steps in time to remove what else would be a bar to the success of his suit, cannot surmount that bar during the trial, by exactly the attack he ought to have made on it directly and within the shorter time allowed by the law of limitation. But this case is not as clear as I should like a case to be, in which I thus applied the law. For it is doubtful in the first place whether the release, in the light of Mahomedan law, has any effect at all so far as the plaintiff 1 is concerned; while it is also very doubtful whether the Hindu law governs Khojas on a point of this kind. So that I shall not decide the case on the ground of limitation

But I must note one argument which was frequently used. Mr. Bhandarkar for the plaintiffs contended that even were this a release, it was never acted upon,

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I confess I hardly know what this means, though there are *dicta* in some of the cases which might suggest that some legal doctrine does underlie it. A release by way of quasi-partition must operate or not. If it operates, then it does so from the date of its completion and execution, and I do not see how there can be any question of its having been acted upon or not. What *is really* meant by the argument is, I think, that the subsequent conduct of the parties shows that there was no intention to extend the operation of the release beyond its executant. Here Abdulla purports to take his son and wife out of the family. But it is said, the evidence shows, that both his son and wife for that matter continued to live with and be maintained by the family, so that neither Datu nor Ismail could really have intended to exclude them under the release. But the operation of a release, as means of partition, is rather legal than practical. It is perfectly consistent with that legal operation that the members of the family should continue to extend hospitality and assistance to those who under the release had lost all rights, as members of a joint family, to the joint family estate. Once the release had taken effect, and so worked a partition, it could only be by intentional re-union that the former members excluded under it could once again become members of a joint family. And this could never be effected without intention, merely by extending towards them such natural kindness, as their relationship would call for. In the present case all the evidence about Jan Mahomed, his mother Ratanbai, his younger brother Aziz having lived and been maintained, the children educated, married and so forth, at the expense of Datu and Ismail, is, in my opinion, if not wholly irrelevant, of little value. That there could hardly have been any deliberate intention to re-unite is clear from the age of the two plaintiffs. Datu and Ismail had nothing

whatever to gain from them. Jan, it is true, was of an age to do business since, say, 1875, but his services could not have been valuable and as I shall presently show from his own letters it is demonstrably certain that as late as 1903 he himself certainly did not believe that he was a member of the joint family consisting of Datu and Ismail, or had any claim whatever on the joint family property. Aziz was a mere child up to 1905. It appears that for the last ten years Jan Mahomed has been living away from Datu and Ismail. As soon as Aziz was old enough to be employed Ismail gave him work to do in the shop, but was careful to pay him wages, and his name is entered in the attendance book among the other employees. There is nothing in all this to indicate any intention on the part of Datu and Ismail to re-unite. While as far as Abdulla is concerned, he has always remained what he was before the release of 1879, a sodden useless drunkard. As the release was probably due to his intemperate and violent habits, it is not likely that once rid of him, Datu and Ismail would have wished to take him back into the family.

As most of the evidence for the plaintiffs has been directed to proving that as regards Jan and Aziz the release was "never acted on", I have thought it convenient to dispose of that argument in this place.

On the same evidence the Court has been asked to infer from the facts that their grandfather and uncle kept these boys, paid for certain ceremonies, educated them and got them married, that they thus became members of the joint family entitled merely as the recipients of much kindness in the past, to insist upon despoiling their benefactors of a great portion of their wealth. This has always seemed to me an absurd proposition, although it frequently makes its appearance in argument. If the joint family relationship is not

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fastened on Datu and Ismail by law, I certainly would not infer that it had been voluntarily undertaken merely because these men showed great natural kindness to their grandsons and nephews while the latter were helpless children and in need of protection. I will now deal with the release in this suit. There can, I think, be no doubt, looking to its wording, but that the parties to it were under the belief that it ought to be shaped to meet the Hindu law of the joint family. Yet it is not an ordinary partition, as it was certainly meant to be. While it displays clearly enough the belief that the requirements of the Hindu law had to be met, it displays with equal clearness the ignorance of the parties to it of that law. It is easy to understand why, in the vicinity of Bombay, these Khojas should believe, however unpalatable that belief may be, that they are governed by the Hindu law. But, since in all probability except for purely legal purposes they never have fully assimilated many of the features of the Hindu law of the joint family it is as easy to understand the peculiarities of an instrument like this release. We have the evidence of Datu to explain how it came about. He says that he went in fear of Abdulla's violence, and was therefore anxious to be free from him. Apparently Abdulla himself wanted his "portion", so it was agreed that he should separate from his father and younger brother Ismail. A panch was convened, and the first draft release appears to have been made at the end of 1878 on this basis. The entire joint family property was valued at Rs. 4,500, and Datu made five lots of it one for Abdulla, his wife and son, worth Rs. 900, one for himself, one for Ismail, one for his unmarried daughter and one for his mother. Had the partition really been made under the Hindu law, had these people any real understanding of the simplest principles of the Hindu law of the joint

family, they would have made three lots, of which Datu would have taken one, Ismail one and Abdulla one. But it is clear that there was no complete partition, nor was it the wish of Datu to separate from Ismail, who appears to have been a good son. The "release" then goes on to divide the nine hundred rupees' share of Abdulla thus: Rs. 400 in cash to Abdulla, Rs. 200 worth of ornaments to his wife, and a house valued at Rs. 300 to the plaintiff, then an infant. Now although such a partition does not conform with the ordinary requirements of the Hindu law, there is nothing objectionable, unfair or unreasonable about it, if the total property owned by the family at that time was not worth more than Rs. 4,500 in all. It was very right to take the precaution of settling something on Jan, *seeing what kind of man his father was. That* house still belongs to the plaintiff, Jan Mahomed; and Abdulla his father has resided in it ever since. Why should it then not be binding on the plaintiff 1, Jan Mahomed? Suppose that the family fortunes of Datu and Ismail instead of increasing had decreased; suppose that this house had turned out a very valuable piece of property, does anyone doubt but that the plaintiff 1 would have insisted as vehemently upon the validity of this release, partition, family arrangement, call it what you will, as he now repudiates it? What is to be looked at in estimating the reasonableness of *such family arrangements (under the Hindu law) is* not the state of the family fortune at the day it is called in question but at the time it was made. If there was then an adequate motive, and if on the whole it was a reasonable and fair arrangement, the Court will not scrutinize too closely the adequacy of the consideration (vide judgment of Chandavarkar, J., in *Chabildas's case*[1]). And though as I have said, I am not sure

[1] (1910) 12 Bom. L R 621.

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whether such a family arrangement could be upheld under the Mahomedan law, I am treating the case here, as though the parties were governed by the Hindu law. It is conceded that doing so affords the plaintiff the best chance of success, since under the Mahomedan law they have no case at all. I attach no importance at all to Abdulla's evidence that the joint family property at the time of the release was worth at least Rs. 10,000, any more than I do to his many other wild and reckless statements. The wonder is that the man is alive and able to talk coherently at all. I accept the valuation put on the property by Datu, as well as his account of the entire transaction. Viewed in that light, I am not disposed to say that it was not a perfectly fair family arrangement made for a sufficient motive, and as such clearly within the rule in *Chabildas's case*[1].

The evidence in the case proves beyond all reasonable doubt that Jan the plaintiff 1 never believed himself to be a member of a joint family in the Hindu sense, or entitled as such to share in the joint family property. We need go no further than his five letters from Rangoon for convincing proof of that. In the witness-box he impudently pretended that he had been sent to Rangoon as a member of the joint family to open up rice business there. But look at the facts. He was given Rs. 140 debited to him (vide Exhibit 16) and immediately afterwards Rs. 5. The latter item is in the current household account as are all Ismail's expenses. Then see Exhibit 22, the account-books of Jan's separate shop. He has admitted that he was carrying on a separate business. The business was in his name and the books in his handwriting. Exhibits 23 and 24 are quarrying contracts in the name of Jan. Exhibit 21 is a licence to keep explosives in

(1) (1910) 12 Bom. L. R. 621.

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his own name Then there is a sale of immovable property in Malad. Ismail was the vendor, the purchaser was an outsider, and Jan himself was the broker. His explanation of this is simply absurd as is his explanation of so many passages in his letters from Burma (Exhibit 12) which prove conclusively, that whether in fact he was or was not a member of the joint family at that time he did not believe himself to be so (see Exhibit 6). In 1881 Ratanbai sold her anklets to Datu (Exhibit 11). Of course had she been a member of the joint family it is hardly likely that any such sale would have taken place. There was no dispute at that time. In 1884 we find Abdulla selling a cart and bullocks to Datu, Exhibit 5. There can be no doubt that he at any rate was separated. On 25th December 1885 Abdulla passed a rent-note to Datu, see Exhibit 30.

Going back to Exhibit 16, which was just before Jan went to Rangoon, the entry shows that the money was meant to be a loan. There were no disputes at that time. Then follow the letters from Rangoon between July and September 1903 in which Jan begs for a loan and offers to pay interest. There is no mention in any one of these letters of what Jan has sworn here that he was sent to Rangoon on joint family business. Datu Raghu's rice shop in Bombay had been closed at a loss in 1902. In one place Jan asks, "what is my share in the Jaoli business I did in partnership with you (Ismail)?" (See Exhibit 13 of the 29th July 1903.) There was a partnership in Jaoli business and Jan's share was ascertained and paid to his-wife Fatma. But this is utterly inconsistent with his evidence that he was all the time a member of the joint family. And see Jan's evidence about these letters. Most of the specially damaging passages were put to him, and he had but one answer, that whenever he said "my" he

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meant the joint family shop or business. Finally he declares his intention of remaining in Rangoon and never returning to Datu or Ismail. As to Aziz he was employed in the shop for the first time in 1907 and was paid wages, vide Exhibit 8. These entries are in his own handwriting, Exhibit 9. Only two witnesses were called for the defendants, Datu and Ismail, but they both appeared to me, particularly Ismail, good. These are the defendants themselves and were only called to prove the release after which the burden of proof shifted to the plaintiffs. The evidence adduced on behalf of the plaintiffs is of the worst kind. Instead of leading off, the plaintiffs reserved themselves and their father to the last, in order, as was suggested, that they might hear what sort of case their witnesses could make for them. And that I think is at least probable. This evidence was directed to proving on what terms Jan and Aziz lived with Datu and Ismail. I have already stated that in my opinion that evidence is useless for that purpose. Conceding all that the witnesses say to be true, I still do not think that this would be enough to prove re-union, or such contributions to the family fortunes as might set up a new joint family, independent of that which had been formed before the release. Much of the evidence about the extent to which Jan and Aziz helped Datu and Ismail in their business is simply ridiculous, notably for example Narayen Kamu.

The plaintiffs relied exclusively on the law. In his last address to the Court Mr. Bhandarkar did not touch the evidence, such as it is, that has been adduced on behalf of the plaintiffs. The oral evidence, leaving aside that of the two plaintiffs themselves and their father defendant 3 Abdulla, is, in my opinion, utterly worthless. I have been over the documentary evidence and I do not find in it anything that calls for special comment.

I will now therefore draw together the various threads of reasoning contained in the judgment so far, and apply the results to the actual decision.

1. I have said that in my opinion the law does not warrant the application of the whole law of the Hindu joint family to Khojas and Memons for any of the purposes of this suit. What in effect the plaintiffs are suing for is a declaration of their rights as members of a joint family under the Hindu law. That I think goes far beyond the reach of any of the authorities. So that upon that ground I should, were the subject less complicated, be prepared to dismiss the plaintiff's whole suit. But having regard to one or two of the decisions I do not think that it would be safe to do so, without dealing with some of the questions raised upon the footing of the Hindu law of the joint family.

2. Assuming that these people do for the purposes of this suit constitute a joint family governed by the whole Hindu law on that subject, it is first to be noted that one great exception to that law has been established. No Khoja son can sue for partition during his father's life-time. Incidentally I must point out that upon the authority of the Privy Council case cited, *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*[1], this takes the Khojas at least clean out of the law of the Hindu joint family. But if the plaintiffs cannot sue for a partition, it is premature to sue for a declaration of what their rights are at present on the footing of being members of a Hindu joint family. No object is to be gained by such a declaration, nor can any consequential relief be given upon it. It might well be that before a partition could be effected both plaintiffs might be dead, and the whole proceedings thus turn out to be infructuous. If this view be correct,

[1] (1888) L. R. 15 I. A. 51

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the only reliefs to which the plaintiffs could at present be entitled are, the cancellation of the release of 1879 against the plaintiff 1 and setting aside the deed of gift of 1902 by Datu to his son Ismail; possibly, though I do not think the time is yet ripe for this, setting aside Datu's will. As to that the only use, which has been made of it in this case, has been in argument, to show that Datu himself still regarded his family as joint. But I think the point has no importance.

3. Now assuming once more that the Hindu law of the joint family governs this part of the case, is the plaintiff 1 entitled to a declaration that the release of 1879 is not binding upon him, and as far as he is concerned must be cancelled? If it is binding upon him then unless he can get it cancelled it would be an effective bar to the whole of his present claim. Therefore following the rule I have indicated, it appears to me that he was bound to sue within three years of becoming aware of it, to have it set aside. And not having done so (for I hold on the evidence that he was well aware of it before he went to Rangoon) he would be time-barred. There would be no need to call in aid section 7 of the Limitation Act. But if it *were* binding upon him, it is hardly likely that he would have been able to obtain its cancellation on the ground of fraud (no details given in the pleadings as by law required) or inadequacy of consideration (vide Chandavarkar, J.'s judgment in *Chabildas's case*(1)) or any other sufficient reason. The release clearly binds Abdulla, and adopting the Hindu law, its effect would have been to take him out of the joint family from the date of its execution. In that event it is equally clear that Aziz could have no case at all in this suit. For it is beyond reason to suppose that he has been re-admitted into the joint family and has by his exertions contributed to its wealth.

(1) (1910) 12 Bom. L. R. 621.

All that could be said for him is, that Datu his grandfather and Ismail his uncle undertook his maintenance, upbringing and education, and defrayed the expenses of such ceremonies as the law required to be performed. But this, in my opinion, affords no ground at all, much less a decisive ground for the inference, that he thus became, what he was not by birth, a member of the joint family. It is only, therefore, the case of the plaintiff 1 that needs any consideration. For he was born at the date of the release of 1879 and on the theory of the Hindu law of the joint family would have thus acquired an independent interest in all the family property, which might survive a release by his father purporting to take himself and his minor son out of the joint family. Here the plaintiff relies solely on the principle of *Wasantrao's case*(1). I have pointed out that the facts there were special. There was no semblance of a partition, because the releasor did not believe that the property was joint family property at all. Here the case is widely different. Ordinarily a release by one member of a Hindu coparcenary does operate as a partition, at any rate as far as he is concerned. It may not be in the strict legal sense a partition, since it may not necessitate a complete partition between all the members of the coparcenary. But if its effect is to take the releasing member out of the joint family, it would likewise, on general principle, as pointed out by Chandavakar, J., take his whole stirps out with him. Nor can I see any distinction in theory between a quasi-partition thus effected and a regular partition.

It surely cannot make any real difference whether one of, say, three coparceners takes his third of the whole property valued at Rs. 1,000 or Rs. 1,000 in cash. The mode of carrying out a partition over large tracts

(1) (1904) 6 Bom. L R 925.

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of the country, inhabited by the poorer rural classes, is to make up the whole property into lots; the members entitled then draw the lots. This is quite a common practice, as I believe, anyone with mofussil experience, will admit. Or it certainly used to be thirty years ago, and I see no reason to doubt that it still persists. Now in such a case suppose there are three brothers A, B, C, partitioning a small estate. Three lots are made, B who has two minor children draws one; A and C offer him its money value and he accepts. A and C thereupon do not carry the partition further. In strict theory they re-unite, but in practice nothing need be done at all. What is the result? Surely that B and his two sons have now ceased to be members of that coparcenary. Would any Court be inclined ten years later, at the suit of these minors to rip open that partition and declare them still entitled, as though their father were dead, to take his share? What then has become of the consideration paid by the other two members of the coparcenary? This is what in fact was done in *Wasantrao's case*[1], and this feature of it has given rise, I believe, to much discussion and criticism among Hindu lawyers. The opinion expressed in this Court, more than once since the decision of that case, has been that it must be very strictly confined to its own facts. This is the more necessary because, while those facts are very special and peculiar, there are indications in the judgment of the learned Chief Justice, that he was quite ready to recognize a release, under other conditions, as operating to separate the releasor and his branch from the rest of the family. The only ground assigned directly in the judgment, namely, the independent acquisition of a right at birth by every child, could not be used generally. For it would apply equally in the

[1] (1904) 6 Bom. L. R. 925.

case of every partition in which one or more of the stirps contained minors. And that is a proposition which I do not think anyone would be found to argue seriously. In this connection I refer to the well established law that an alienation by one of two or more coparceners to a stranger, operates as a partition of the estate. The alienee can come in on the strength of the alienation and insist upon having a partition made. It is true that we here come in sight of another and quite unique feature, hardly belonging to the Hindu law proper, but engrafted on it by the decisions of the Courts, namely that while such an alienation works a partition, it goes no further than the alienor's share. That is to say that the alienee comes in exactly in the shoes of the alienor, and is liable to be called upon to divide again with all the members of his stirps claiming under him; in other words, that two partitions are worked out at one and the same time. But my point is that so far as the minors under the alienor are concerned they have no right at all to protest against the partition. Now suppose such an alienation were made at a time when the entire estate was worth no more than three thousand rupees, and that the alienee of a third lay by for a year or so, and then enforced his rights. First let us suppose that he had allowed a long time to elapse, and that the value of the joint family property had increased by 100 per cent. and in the meantime three sons had been born to the alienor. To what would the alienee be entitled? That is one view of this difficult doctrine; another more germane to my purpose is this. Suppose the alienee enforces his rights (as in my opinion he ought to do at once) before the conditions have changed. His alienor has four minor children. The property is partitioned into three lots, worth Rs. 1,000 each. The alienee takes one of them and has to divide it with the minor children each of whom gets

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Rs. 200. The other two brothers either do not separat or immediately re-unite, and by the time the minors a of age, their share of the property is worth three lac On the principle of *Wasantrao's case*[1] the minors migh now come in and contend that they were no parties t their father's alienation which had turned out so badl for them, that they were not bound by it, as each ha acquired a vested interest at birth, and were therefor entitled to a re-partition of the estate in the hands o the other former coparceners. No such case has ye arisen I believe in any of our Courts, but I see n reason why it should not. But the broad rule of th Hindu law is that fathers effecting a partition, whether directly or indirectly, carry their children with them. The principle of representation here overrides the principle of the vested interest at birth, and if the Courts are satisfied that the "partition" whether direct or indirect by way of release or family arrangement was fair and reasonable, the minor children of the releasor or maker of the arrangement for them will not be allowed to set it aside on attaining majority. And that is the principle I would apply in the present case.

Thus assuming that if there were no such principle, or if the release were of the kind dealt with in *Wasantrao's case*[1], the minor children would not be bound by it, then no bar of limitation would exist against plaintiff 1 in this case. But as there is such a principle and the release here is very different from the release in *Wasantrao's case*[1], it appears to me that the bar of limitation does exist, and has not been surmounted. In my opinion the plaintiff 1 is time-barred. Further even assuming that there is no bar of limitation and that the suit is governed by Article 127 so far as the

(1) (1904) 6 Bom. L. R 925

Limitation Act reaches, we have still to see whether the release is not a good family arrangement binding upon the plaintiff. As to Article 127 I have shown, with some elaborateness, that I do not think it ever can apply to Mahomedans merely qua Mahomedans, and I doubt very much whether it can apply even to these Khojas and Memons except in proper cases, where the property is shown to have gone through one unimpaired descent and thereafter to have been held by the survivors as joint family property. Such a case uncomplicated by a release or other form of partition might very well occur, and then Article 127 certainly would apply. But this is not such a case, because those claiming are not in a position to sue for partition, and therefore not in a position to claim any share of the joint family property. Further this case *is* complicated by a release. Under the Hindu law, as laid down in *Chabildas's case*[1], I think that that release was a perfectly good family arrangement, having regard to all the circumstances then existing. The property was not then very large. Abdulla was a useless and objectionable member of the family. He wanted to go out of it, and the other members wanted to be rid of him. They gave him a fair share, and so divided it that the interests of his only minor child were protected. Upon a right understanding of the Hindu law if the total value of the joint family property had then been, as I hold it was, Rs. 4,500, Abdulla got a good deal less than he was entitled to, and so did the plaintiff 1. But we cannot go back thirty years to examine all those details. According to the understanding of the parties a fair distribution was made. Abdulla accepted it for himself and his minor child. I do not see why the Court should now interfere, merely because since that time Ismail has by his own personal skill and industry acquir-

(1) (1910) 12 Bom. L. R. 621.

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ed very valuable properties, to a share in which the plaintiff 1 can have no conceivable moral or equitable right. It is indeed only by applying the nucleus doctrine that he could ask to investigate the steps by which Ismail has made his fortune, and I see no ground in any of the authorities for applying that doctrine to Khojas and Memons, while there are cogent reasons for excluding it. Speaking for myself I would not extend the Hindu law of the joint family one inch further than the authorities actually compel me. I have shown that they do not yet compel the Courts to extend it very far, certainly not the length I think of introducing the nucleus theory into the system of law by which these sects are governed. On the other hand I have pointed out the great practical difficulty of drawing the line, so long as succession is understood to include succession modified by the Hindu law of the joint family, to undivided ancestral family property. In the first place there *is not* and can never be any succession in the ordinary sense of the word where the property is of that character. And that is a consideration to which sufficient attention has not, I venture to submit, yet been paid. In the next place if succession and inheritance are terms which in this special connection are meant to be applied only to the mode of regulating shares in property undisposed of by will, the character of the property, where that mode is to be sought for in the Hindu law, cannot be neglected. And that would open the door in every case to the usual interminable enquiries as to the manner in which the property had been acquired from the remotest period at which the family ancestry could be found. And again it is worth noting that if the property be really ancestral or joint family property in the true Hindu sense, no will could ever be made. So that succession would then always be confined to cases of intestacy,

and if the property were found to be joint family property, to cases in which succession proper does not exist at all. But this again opens up another large question the fringe of which was touched in *Mahomed's case*[1], where Scott, J., held that because the property was ancestral joint family property, a will in fact made was invalid. How far the extension of the Hindu law of "simple succession and inheritance" precludes Khojas and Mêmons from making a will under their own law, is a question which will have to be settled very definitely and very soon.

But in this case it is quite clear that no question of succession or inheritance arises at all. It may in the future but it has not yet arisen. The most that the plaintiff 1 can say is that the release might operate to bar his claim when the time shall be ripe for bringing it. But if it does I say he is already time-barred in that respect, and can obtain no relief of that limited kind in this suit. Further I am very clearly of opinion that he never will be entitled to any relief on the general ground, as a member of a joint undivided Hindu family. For I hold that the release of 1879 was a perfectly good family arrangement under which Abdulla and his stirps went out of the family (if they were ever in it), and therefore that even were this a case of "succession or inheritance" within the meaning of the authorities, this plaintiff could not succeed.

There can be no question on the evidence, what the understanding of the parties themselves has all along been. I think I have shown in my brief examination of the documentary evidence for the defendants, that it all points one way It is only consistent with all parties concerned having fully accepted the release as a partition, and having acted upon that understanding

(1) (1885) 10 Bom 1.

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for thirty years. That being so I find no ground upon which any part of the plaintiff's claim could be awarded. I hold that it entirely fails and must now be dismissed with costs.

Attorneys for the plaintiff: *Messrs. Mansukhlal, Jamsetji and Hiralal.*

Attorneys for the defendants: *Messrs. Mirza, Mirza and Mangaldas; Mulji, Khambata and Thakoredas; Nadirshaw and Darasha.*

Suit dismissed.

H. S. C.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1913. *August 26.*

SORABJI HORMUSJI BATLIVALA (DEFENDANT), APPELLANT, v. JAMSHEDJI MERWANJI WADIA (PLAINTIFF), RESPONDENT.*

Negligence—Driving motor-car at excessive speed—Injury to bare licensee being driven in car—Liability of car owner—Quantum of damages.

The defendant was driving a party of relatives and friends (including the plaintiff) in his motor-car from Deolali to Igatpuri. The road at one point turned somewhat abruptly to the left and crossed the lines of the Great Indian Peninsula Railway by means of a level crossing; after the level crossing the road turned abruptly to the right. The defendant who was driving his car at an excessive speed drove over the crossing at the time that a train was there due. Though it got over the crossing safely the car failed to take the abrupt turning to the right and jumping an embankment rushed into a paddy field below. The occupants of the car, with the exception of the defendant, were thrown out with much violence and the plaintiff received such grave injuries as would render him a cripple for the rest of his life. The plaintiff sued to recover damages caused to him by the defendant's negligence.

Held, that putting the skill and caution exigible from the defendant at the very lowest, he was grossly and culpably negligent, that he was liable in damages to the plaintiff and that in assessing damages the same principles

* O. C. J. Appeal No. 6 of 1913; Suit No. 684 of 1911.

should be applied whether the person who had incurred the liability was a private individual or a wealthy company.

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In September 1910 the plaintiff was staying with a friend of his, one Kapadia, at Deolali. The defendant lived with his relatives in the adjoining bungalow. On the morning of the 18th September 1910 these two neighbouring families organised an excursion to Igatpuri and back. The party was accommodated in two cars, one of them belonging to Kapadia and the other a steam car to the defendant. The plaintiff was given a seat in the defendant's car.

At one place the road from Deolali to Igatpuri turns sharply to the left and crosses the lines of the Great Indian Peninsula Railway by means of a level crossing; after the crossing the road turns abruptly to the right. The turning to the right would not be seen by the driver of a car until he was on the level crossing and his view would be impeded by a railway gateman's lodge which at the time in question stood at the far side of the crossing.

It appeared that the defendant was driving his car at an excessive speed when he reached the crossing, at which time a railway train was due to pass and the signal at the crossing had already been lowered in favour of the train, and that the defendant, whether owing to the previous excessive speed of his car or to his attempt to get clear of the crossing before the passing train, failed to negotiate the sharp turn to the right in the road beyond The car left the road, jumped down an embankment nearly ten feet high and rushed for a considerable distance into a paddy field below. Owing to the impact all the occupants of the car with the exception of the defendant were thrown out and one of them was killed on the spot.

The plaintiff received serious injuries, consisting of fractures of the shin bone of the left leg, of the hip

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socket and of the pelvis and dislocation of the left thigh bone. He was brought to Bombay and was kept at Dr. Masina's hospital for three months for treatment. He was next removed to his sister's house where he was attended to by several doctors for three months. He was then advised to go to England, which he did. He was advised that a cure would never be effected and that he would be a cripple for life.

On the 19th August 1911 the plaintiff sued to recover Rs. 69,000 as damages from the defendant.

The defendant denied negligence and also his liability to pay any damages to the plaintiff.

The cause was tried by Mr. Justice Macleod who on the 2nd of December 1912 gave judgment in favour of the plaintiff. On the question of negligence the learned Judge held that the defendant was unquestionably negligent and that the accident was due to the defendant approaching the crossing at an excessive speed.

By a separate judgment delivered on the 3rd of December 1912 the learned Judge, after reviewing the evidence relating to the various expenses incurred by the plaintiff, awarded the plaintiff Rs. 38,000 by way of damages.

The defendant appealed.

Setalvad, with *Davar* and *Mody*, for the appellant.

Strangman, Advocate General, with *Wadia* and *Bahadurji*, for the respondent.

Setalvad :—The plaintiff was a mere licensee. See *Moffatt* v. *Bateman*[1] ; *Giblin* v. *McMullen*[2] ; *Lagunas Nitrate Company* v. *Lagunas Syndicate*[3] ; *Harris* v. *Perry & Co.*[4].

(1) (1869) L. R. 3 P. C. 115.
(2) (1868) L. R. 2 P. C. 317.
(3) [1899] 2 Ch. 392.
(4) [1903] 2 K. B. 219.

Strangman was heard only on an item of £103 for hotel and other expenses.

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C. A. V.

BATCHELOR, J.:—The suit which gives rise to this appeal was filed to obtain damages for personal injuries sustained while the plaintiff, as a bare licensee, was being driven gratuitously by his friend, the defendant, in the defendant's motor-car.

The learned trial Judge, Macleod J., has found that the defendant is liable on the ground of negligence, and has awarded to the plaintiff the sum of Rs. 38,000 as damages. The defendant now appeals from that decree.

It will be convenient to use the word "accident" in reference to the occurrence, but the word must be understood in its popular sense, and not as indicating any suggestion as to whether the occurrence was, or was not, avoidable. The accident, then, occurred while the defendant was driving a party of relatives and friends in his white steam car from Deolali to Igatpuri. On the way there is a level crossing over the G. I. P. Railway and this crossing admittedly is such as needs some degree of care to pass in safety. Coming from Deolali it is approached on a fairly straight road, but the crossing itself turns to the left somewhat abruptly from the road, and, when once the crossing is passed, the road swings round sharply to the right: see the plan, Exhibit B. Moreover, as this plan and the photographs on the record show, this sharp turn of the road to the right is invisible to an approaching driver until he is practically over the level crossing; and his view to his front is further impeded by a railway gateman's lodge situated on the far side of the crossing to the approaching driver's right hand. Admittedly the defendant's car, for one reason or another, failed to take the sharp

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right-handed turn after the crossing: instead of doing so, it preserved its direction in practically a straight line, with the result that just beyond the crossing it left the road and ran, or jumped, down the bank to the left into the paddy field beyond. Except the defendant himself, who was at the wheel and thus had some support, all the occupants of the car were thrown out with much violence, and were more or less seriously injured; one little girl was unfortunately killed outright, and the plaintiff received such grave injuries to his leg that he will, as the medical evidence proves, remain a cripple for the rest of his life.

The first question which arises is whether the learned Judge below was right in holding that the defendant is in law liable in respect of the injuries caused to the plaintiff. The plaintiff, as we have said, was a bare licensee, and the defendant in driving him was giving his services gratuitously as a friend. In these circumstances it is contended for the defendant that no liability can attach to him unless he is shown to have been guilty of gross negligence, of something amounting to culpable default, and that in law he is not liable for mere want of foresight or mistake of judgment. In support of this contention Mr. Setalvad has cited *Moffatt* v. *Bateman*[1] and *Giblin* v. *McMullen*[2]. If the law laid down in these decisions caused any embarrassment to the present plaintiff in the facts underlying this appeal, it might be relevant to observe that *Giblin* v. *McMullen*[2] was not a case of an accident at all, and that in *Moffatt's case* the judgment was largely based upon the consideration that the evidence did not disclose any tenable theory to explain how the accident arose. In our opinion, however, it is unnecessary to pursue this subject, because this case must be decided on its own facts, and those facts are decisive against the

(1) (1869) L. R. 3 P. C. 115. (2) (1868) L. R. 2 P. C. 317.

defendant even on the assumption that the rulings in the two cited cases are applicable without reservation or qualification. In other words, it is unnecessary here to attempt either to fix the precise difference between negligence and gross negligence, or to define the exact degree of the defendant's liability. For, in our view, on the facts of this case, the defendant's negligence and carelessness were such that, putting the law as to his responsibility most favourably to him, it is impossible to acquit him of liability; assuming that gross negligence amounting to culpable default is required, then we think we have it here.

It appears to us, however, that the determination of this point of law will be facilitated if we consider not so much the degree of negligence which would expose the defendant to liability as the nature of the positive duty, which, in the circumstances of this case, was cast upon him. Upon this aspect of the matter we have the guidance of the Earl of Halsbury's "Laws of England" (title 'Negligence', Article 641). Mr. Setalvad admits that the driving of a motor-car is a business or occupation requiring skill, and undoubtedly the defendant had that skill: that being so, and he being a volunteer, the article cited lays down that he was bound to act to the best of his skill, which must be such as a person skilled in such matters may reasonably be expected to possess. Reference may be made to *Wilson* v. *Brett*[1] where the point is illustrated. That was a case where the defendant, who was skilled in the management and riding of horses, rode the plaintiff's horse gratuitously at the plaintiff's request in order to show the horse for sale. In riding over slippery ground the defendant let down the horse and injured him by breaking his knee. The Jury found for the plaintiff, and, on a motion for a new trial on the ground of misdirection, Parke B. stated the

[1] (1843) 11 M. & W. 113

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law thus in his judgment :—"The defendant was shewn to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use : if he did not, he was guilty of negligence. The whole effect of what was said by the learned Judge as to the distinction between this case and that of a borrower, was this; that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it." And Alderson B. gave judgment to the same effect. In our present case the defendant was admittedly a person of competent skill in driving a motor-car, though the evidence suggests that he was a nervous driver; moreover he placed himself in a situation which implied the possession of competent skill.

If this is a correct statement of the law, the only question which remains is whether the defendant at the critical point of the drive exercised such skill as a person skilled in driving motor-cars may reasonably be expected to possess. We entirely agree with Macleod, J., that this question must be answered in the negative. In our opinion the evidence establishes that the sole cause of the disaster was the excessive and reckless speed at which the defendant was driving.

It appears to us that this explanation is the only reasonable explanation of the proved or admitted facts, and is also the explanation which defendant himself offered immediately after the accident. It is not easy to feel quite confident as to the details of the defence which is now attempted; but the gist of it appears to

lie in the assertion that, as the defendant approached the level crossing, only the left hand gates were thrown open for his passage, and that the roadway was thus so blocked that even at the eight or nine miles an hour at which he was travelling, he was unable to turn the car after it had passed the further gate. Upon the evidence *it is, we think, not possible to hold that the incident* occurred in this way. It is, however, material to note that, on his own showing, the defendant, at least by the time he had reached the crossing, became aware of the proximity of the oncoming express, and accelerated his speed on this account. It might at first sight seem that this was a very plausible admission, and, being to some extent against the defendant's own interest, should be accepted as the whole truth but it is to be observed that, in view of the defendant's first statements made on the Igatpuri platform in the presence of such independent witnesses as Cherry and Arnot, it was not open to the defendant to avoid the admission that he quickened his speed at or about the crossing.

The foundation of the defendant's case as made in this appeal lies in the contention that on his approaching the crossing the right hand gates were closed to him, that he had to pass through the left hand gates, which alone were opened to him, and that in consequence his course was fatally hampered. It is very possible that the defendant in the moment of confusion and danger did not really observe the condition of the gates, but in any event we are satisfied that his present account of their position is incorrect. His own best witness, indeed the only witness on the defendant's side who inspires us with any confidence as to the circumstances of the accident, is Mr. P. S. Taleyarkhan, who was driving the Renault car containing the other members of the excursion. Mr. Taleyarkhan, who crossed the railway a minute or two before the

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defendant came up in the steam car, deposes that the right hand gates were opened for him and that he had no difficulty in keeping to the road; it is indeed admitted by Mr. Setalvad, and is manifest from the plans, that the crossing and turning present no more difficulty if the right hand gates are open than if all the gates are open, and defendant's case confessedly depends upon the theory that the left side gates, and they alone, were open. Now the evidence is practically uniform that, just after Taleyarkhan had crossed, the gateman was proceeding to shut the opened right gates, when he heard the defendant's horn and, suspending the operation of closing the gates, he at once threw them open. It is, in our judgment, not believable that at such a juncture the gateman should have taken the useless trouble to finish closing the half closed right gates in order that he might open the less convenient left gates which were fast shut. Further, if we were forced to suppose that the gates on one side only were opened, it is reasonably certain that they would be the right hand gates; they gave the driver a very much more convenient access, as the gateman must have realised, and realised the more readily as the road is frequented by motor-cars. Even on this footing, therefore, the defendant's case fails. But upon the evidence we see no escape from the conclusion that all four gates were thrown open to the defendant's passage. We do not for a moment suggest that Mr. Taleyarkhan is not telling the truth to the best of his recollection, but if, as he admits, he found the right hand gates open, he would not be concerned to observe whether the left gates were open or shut, for their position would have been a matter of no moment to him. However, that may be, we find that in fact all four gates were opened for the defendant. This finding seems to us to be established by the independent witnesses, Shivram Cupe,

Gangaram Dagdu and Ganpat Bhau. These men, who are Hindus and have no interest in the success of either party, are not shaken in cross-examination ; their statements carry conviction to our minds, and they were believed by the learned Judge who heard and saw them. We do not seek to fortify them by the similar testimony of the chauffeur Shekh Lal Mahomed, because there are passages in his deposition which lead us to doubt whether he is telling the whole truth. But we rely upon Shivram, Gangaram and Ganpat ; and these witnesses prove not only that all four gates were opened for the defendant, but that the defendant came up to the crossing and passed over it at excessive speed. There is all the more reason to accept this evidence as to excessive speed because it really derives confirmation from defendant's own version. Admittedly he accelerated because he knew the train was approaching : the only question is, when did he do so? He says he did so on reaching the first rail at the crossing, while the plaintiff's witnesses declare that he came up to the crossing at high speed. Now Mr. Arnould's testimony and the other evidence prove that the lowered signal, which, apprising the defendant of the approach of the train, led him to increase his speed, would have been seen long before he reached the crossing ; and, in any event, if he was safely on the crossing going at seven or eight miles an hour with no train in sight, his passage was assured, and there was no need to quicken the speed. There are also three other facts disclosed upon the evidence which, as we think, corroborate the plaintiff's case of excessive speed, and are scarcely reconcilable with the defendant's version : these facts are, first, that, with the exception of the defendant who had hold of the steering wheel, all the occupants of the car were shot violently out ; secondly, that the car did not run down, but jumped,

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the fairly easy slope of the bank down from the road into the field; and, thirdly, that the car ran on for a distance of as much as thirty feet into the soft, muddy paddy field.

Turning now to the account which the defendant himself gave of the event shortly after its occurrence and before he had had time to "think a lot over the causes of the accident," as in his own words he has since done, we find this account established by the two independent witnesses, Arnot and Cherry. No attempt has been made by defendant's counsel to discredit these gentlemen in any way, and indeed the most that the defendant himself can allege against them is that they do not report his statements *verbatim*. That may be so, but we think that no one who reads the depositions of these witnesses fairly, without any effort to evade their plain meaning, can fail to understand their significance. "He said", says Mr. Cherry, referring to the defendant, "he either saw or knew the train was coming. He saw the gates open, and hurried on to get through before the train. He was unaware of the turn to the right, and went straight on." Mr. Arnot confirms this account, and there can be no doubt of its truth. We have it, therefore, that within a few hours of the occurrence the defendant in explaining it attributes it to his own haste in trying to rush through the open gates and to his ignorance of the abrupt turn; that, in our judgment, is enough to dispose of the theory that any gates were closed against him, or that his speed was within the limits set by ordinary prudence. It may be added that this almost contemporaneous explanation makes no mention of muddy roads, of the car being bumped badly over the rails, of the gear being loose, or of any other matter on which the defendant's case is now sought to be based. The occurrence is attributed to two causes only, high speed and the driver's carelessness as to the character or

direction of the invisible road in front of him. We have no doubt that these causes, and these alone, led to the disaster which the defendant himself has such good reason to deplore.

As to the evidence called for the defence, it is unnecessary to add much to what has already been said. Upon the defendant's own testimony it is, as we have indicated, not possible to rely; that may well be because his observation at the time of the sudden disaster was imperfect or because on looking back at these events, and pondering over them from his own point of view, his memory has betrayed him. But the result is that his version of the disaster cannot be accepted. And in the circumstances of the case we cannot concede that that version derives any increased plausibility by reason of the fact that it is more or less supported by the defendant's own wife and her father. Nor is the balance of the evidence materially affected by the testimony of the boy Kaikobad Mody, who admits his sense of obligation to the defendant, or of Temuras Mody, who is apprenticed to the defendant and is working under his manager. As to Mr. Taleyarkhan, his evidence, in so far as it tells in the defendant's favour, has already been considered.

On a consideration of the whole evidence, therefore, we are bound to agree with the conclusion of the learned trying Judge, that the sole cause of the disaster was that the defendant, in order to get ahead of the coming train, drove to the crossing and over it at excessive speed, and in total disregard of the need for caution imposed by the fact that the road in front of him was hidden from his view on account of the abrupt turning. In these circumstances we cannot doubt that, putting the skill and caution exigible from the defendant at their very lowest, he was grossly and culpably negligent. It follows that he is liable in damages.

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As to the amount of damages which should be awarded, the learned Judge has allowed Rs. 8,000 on the score of expenses, Rs. 10,000 on the score of pain and suffering, and Rs. 20,000 on the score of loss of income, past and prospective. All these items have been canvassed by Mr. Setalvad for the defendant, but we have heard no argument which would justify us in interfering with the damages allowed under the two last-mentioned heads. The plaintiff is a young man who had a career of good promise before him. That career has been ruined; he has already suffered intense pain and is likely to suffer in the future; he is crippled for life; and his means of earning a fair income in the future, if they have not been destroyed, have been lamentably reduced. Therefore on neither of these heads can the damages awarded be regarded as excessive.

We think, however, that a reduction of Rs. 2,000 should be made from the Rs. 8,000 which Macleod, J., allowed for expenses. The details supplied by the plaintiff in Exhibit 10 show that these expenses have been calculated on a somewhat extravagant scale, yet the plaintiff's own estimate is exceeded by the learned Judge by about Rs. 400. We cannot allow Mr. Setalvad's contention that the plaintiff was not justified in going to England at all for treatment, seeing that he was advised to do so by his own surgeon, Dr. Masina, a gentleman of acknowledged professional skill. But the expenses incurred while in England on account of hotel and other charges and various sums debited on account of board and lodging, clothing, and expenses at Deolali seem to us to be exaggerated, and upon consideration of the evidence and the arguments on these points we think it right to reduce the Rs. 8,000 on this head to Rs. 6,000.

The result, therefore, is that the only alteration to be made in the decree is that the damages allowed to the

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plaintiff are to be Rs. 36,000 instead of Rs. 38,000; in other respects, the decree under appeal is affirmed.

As to costs, each party will bear his own costs of the last day's hearing of the appeal, and all other costs in the appeal must be borne by the defendant-appellant.

Attorneys for the plaintiff: *Messrs. Payne & Co.*

Attorneys for the defendant: *Messrs. Captain and Vaidya.*

Appeal dismissed.

H. S. C.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1913 September 5.

THE GREAT INDIAN PENINSULA RAILWAY COMPANY (DEFENDANTS), APPELLANTS, v. THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY AND ANOTHER (PLAINTIFFS), RESPONDENTS.[c]

Indian Railways Act (IX of 1890), section 7—City of Bombay Municipal Act (Bombay Act III of 1888), sections 289, 293—Public streets—Vesting of public streets in Municipality—Laying railway lines under statutory authority over such streets—Land Acquisition Act (I of 1894), section 7—Proceedings under Land Acquisition Act unnecessary in case of such streets.

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Held that the statutory authority under section 7 of the Indian Railways Act was established and that the application of section 293 of the City of Bombay Municipal Act was excluded by the words "notwithstanding anything in any other enactment for the time being in force" in the first-mentioned section.

Held, further, that where a railway company wished to lay a line of railway upon and across a street it was neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisition of the land, because if the Government under section 7 of the Act were to direct the Collector to take order for the acquisition of the land he would make his award and take possession and the land would then vest absolutely in Government for the railway company free from incumbrances and would then cease to be a portion of the street and the railway company would be unable to exercise the power given to it of constructing the railways upon and across the "street"

Held, further, that the effect of section 289 of the City of Bombay Municipal Act vesting all public streets, pavements, stones and other materials in the Corporation and under the control of the Commissioner was only to vest in that body such property as was necessary for the control, protection and maintenance of the street as a highway for public use

IN the year 1906 the Great Indian Peninsula Railway, having obtained the sanction of the Secretary of State for that purpose, were constructing a branch railway in Bombay, known as the Harbour Branch Railway, and desired for the purpose of that undertaking to lay their lines across a public street, namely the Sewri Koliwada Road, as such vested in the Municipal Corporation of Bombay At first the Railway Company requested the permission of the Municipal Corporation. The laying of a temporary tram line across the street in question was sanctioned by the Municipal Corporation subject to certain conditions and correspondence ensued as to the terms on which permanent rails might be laid down. No agreement as to the terms to be imposed on the Railway Company having been arrived at finally the Railway Company informed the Municipal Corporation that it did not appear to them to be necessary that there should be any special agreement on the subject as the Railway Company were advised that they had the power under the Indian Railways Act to

construct lines of railway across the Sewri Koliwada Road without obtaining the permission of the Municipality or resorting to the Land Acquisition Act. The Railway Company thereafter completed the construction of their lines across the Sewri Koliwada Road without having obtained the permission of the Municipal Corporation.

The Municipal Corporation filed the present suit to obtain a declaration that the defendant Railway Company was not entitled to take possession of the public street upon which they had laid their permanent lines of railway, *alleging that the defendant had no right to do* what was done " without the permission of the plaintiff Corporation, and that having regard to the provisions of section 7 of the Indian Railways Act they had not any legal right to lay and maintain their said lines upon and across the said street, and in the absence of such permission can only obtain such right by acquiring the said land under the provisions of the Land Acquisition Act ". The defendants' contention was " that they had the power under the Indian Railways Act to construct lines of railway across the Sewri Koliwada Road without obtaining the permission of the Municipality or resorting to the Land Acquisition Act ".

The cause was tried by Beaman, J., on the 17th February 1913, when his Lordship granted the declaration sought on the following grounds.

BEAMAN, J. :—Notwithstanding the ingenious arguments of defendant's counsel the point seems too simple to allow of any doubt. Without enquiring how much or how little, under the term " street ", vests under section 289 of the Municipal Act, enough certainly does (and this was almost conceded) to support an action for trespass against anyone interfering with the use of a public street as such. Section 293 expressly and designedly contemplates a case like this. No argument

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has been attempted in support of what was foreshadowed in the first issue. That was abandoned. No permission has been granted. Then let me consider section 7 of the Railways Act. Is a public street "immovable property"? Certainly. Does this public street belong to the defendant-Company? Certainly not. The only question remaining to be answered is whether it is immovable property subject to the Land Acquisition Act. In my opinion, most surely it is: defendant contends that it is not, because it is already a public street, and that which is already public property cannot be acquired a second time for a second public purpose. I am not aware of any authority or of any reason upon which that proposition can be founded. I am referred to section 10 and section 14, the latter more emphatically, in support of this contention. I am unable to see how the section can have any bearing or relevancy. The former section merely deals with damage caused by the Company acting under section 7 and presupposes of course that it is acting under that section. It is said for the defendant-Company here, that it cannot be a trespasser because it is acting under statutory authority. That simply begs the question. If it is, *cadit quæstio*. If not, it is as much a trespasser as though section 7 were not there. Section 14 cannot possibly bear the artificial strain put upon it to support the defendant's argument. It merely deals with a numerous class of cases, of which this might have formed an example, had the Municipality acting under section 293 of its Act permitted the defendant Company to lay its rails without any conditions. I do not think that any of the cases cited for the defendant-Company are of any assistance. Nor do I think that I gain much from *Rangeley* v. *Midland Railway Co.*[1] upon which the plaintiff relies. That is certainly in point, and in

[1] (1868) L. R. 3 Ch 306.

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spite of the attempt of the defendant to distinguish between the provisions of section 84 of the Land Clauses Act in England and the provisions of the Land Acquisition Act, the case is a good enough authority upon the general principle. But here I do not feel in need of authority. I have the statutes and I have only to apply them to a simple set of admitted facts. Under those statutes the defendant-Company could make its private terms with the Municipality, or it could acquire the portion of the street it needed under the Land Acquisition Act. But until it has done one or the other it is clearly a trespasser upon the plaintiff's land. It does not seem to me to affect this conclusion in the least that there may be some doubt as to the quantum of interest the plaintiff has to sell in proceedings under the Land Acquisition Act. The plaintiffs do not press for any particular quantum of damages and it would be sufficient to award them Rs. 500 as damages for trespass and all costs of the suit. Declarations in terms of prayers (*a*) and (*b*) of the plaint and decree in terms of prayer (*c*) thereof.

The defendant Company appealed.

Binning with *Campbell* for the appellants :—The only question is whether a railway can lay its lines across a road without acquiring the road and without permission of the Municipality. Section 7 of the Indian Railways Act (IX of 1890) is taken from section 16 of the Railway Clauses Act of 1845. Our point is that we are not taking or acquiring the land. If we acquired the land we should acquire all the easements. We should stop the street. *Cole* v. *Miles*[1] and *Escott* v. *Newport Corporation*[2] were cited.

Jardine with him *Strangman*, Advocate General, for the respondents :—Section 293 of the City of Bombay

[1] (1888) 57 L. J., M. C. 132. [2] [1904] 2 K. B 369.

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Municipal Act should not be taken as overruled by the Indian Railways Act but should be read with it. We have an interest in the land. The provision in the Indian Railways Act as to the Land Acquisition Act was put in to prevent the Railway Company entering upon our land without paying for it.

SCOTT, C. J.:—This suit was instituted by the Municipal Corporation and Commissioner of Bombay against the Great Indian Peninsula Railway Company to establish that the defendant-Company could not lawfully maintain lines of railway across the Sewri Koliwada Road, a public street vested in the Corporation under section 289 of the Bombay City Municipal Act, without either obtaining permission granted by the Corporation and confirmed by Government under section 293 of the Municipal Act or acquiring the land required for the level-crossing under the Land Acquisition Act.

The defendant-Company pleaded that they had authority to make and maintain the lines of railway under section 7 of the Indian Railways Act (IX of 1890) which so far as is material is in the following terms:—

"(1) Subject to the provisions of this Act and, in the case of immovable property not belonging to the railway administration, to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for companies, and, subject also, in the case of a railway company, to the provisions of any contract between the company and the Government, a railway administration may for the purpose of constructing a railway or the accommodation or other works connected therewith, and notwithstanding anything in any other enactment for the time being in force,—

(a) make or construct in, upon, across, under or over any lands, or any streets, hills, valleys, roads, railways or tramways, or any rivers, canals, brooks, streams or other waters, or any drains, water-pipes, gas-pipes or telegraph lines, such temporary or permanent inclined planes, arches, tunnels, culverts, embankments, aqueducts, bridges, roads, lines of railway, ways, passages, conduits, drains, piers, cuttings and fences as the railway administration thinks proper . .

(2) The exercise of the powers conferred on a railway administration by sub-section (1) shall be subject to the control of the Governor General in Council."

It appears from Exhibit 1 that the scheme for the Bombay Port Trust Railway, to run from Sion down the east side of the Island to the Ballard Pier and to be constructed and worked by the defendant-Company, was prepared by the Company with the approval of the Secretary of State on the recommendation of the Government of India. The plan put in with Exhibit A shows the level-crossing in question as part of this scheme.

The learned trial Judge held that applying the statutes to the admitted facts the defendant-Company could make its private terms with the Municipality or it could acquire the portion of the street it needed under the Land Acquisition Act but until it had done one or the other it was a trespasser on Municipal land. His reasoning was—the public street is immovable property not belonging to the defendant-Company and subject to the Land Acquisition Act, therefore the defendant-Company cannot exercise the power given by section 7 of the Railways Act without first acquiring a portion of the street, which they have not done.

We are unable to agree with this view of the law. Where a railway company wishes to lay a line of rail way upon and across a street it is neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisition of the land. If the Government under section 7 of that Act were to direct the Collector to take order for the acquisition of the land he would make his award and take possession and the land would then vest absolutely in Government for the railway company free from all incumbrances. The land would then cease to be portion of the street and the railway company would be unable to exercise the power given

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to it of constructing the railways upon and across the "street".

The differences in the English and Indian Statute law upon the subject of railway construction are differences of procedure which do not render English decisions inapplicable to this case. In England the special undertaking is sanctioned by a special Act of Parliament: in India, by the sanction of the Governor General through the Home Department. Section 6 of the Railway Clauses Consolidation Act, 1845, provides that "In exercising the power given to the company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the Lands Clauses Consolidation Act" while the provisions of the special Act incorporate both the Lands Clauses and the Railways Clauses Consolidation Acts: for an example, see *Abraham* v. *Great Northern Railway Company*[1]. The provisions of the Lands Clauses Act with regard to compulsory acquisition as interpreted by the House of Lords in *Great Western Railway Co.* v. *Swindon and Cheltenham Railway Co.*[2] are substantially of the same extent as those under the Land Acquisition Act of 1890 as interpreted by section 3 (*a*) and (*b*), for Lord Watson at page 800 said: "Taking that (the Lands Clauses) Act *per se*, and irrespective of the terms of any other statute, these clauses do not appear to be applicable to the compulsory taking of an easement, at least in the sense in which the respondents are by their Act empowered to purchase and take such a right. The only easements which these provisions, read by themselves, seem to contemplate are servitude rights burdening the corporeal lands taken by the company, which are destroyed or impaired by the construction of the railway. The company are

(1) (1851) 16 Q. B. 586. (2) (1884) 9 App. Cas. 787.

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not dealt with as being either entitled or bound to purchase and take such easements, but as liable to make compensation in respect of their having by the construction of their authorised works injuriously affected the dominant land to which the easements are attached. As for the land upon which the railway is to be constructed, the compulsory clauses of the general Act contemplate that the company shall take the soil itself, and not a mere right to use it in perpetuity." To the same effect is Lord FitzGerald's opinion expressed on page 792.

The effect of section 289 of the Bombay City Munici pal Act vesting all public streets, pavements, stones and other materials in the Corporation and under the control of the Commissioner is only to vest in that body such property as is necessary for the control, protection and maintenance of the street as a highway for public use : see *Mayor, etc., of Tunbridge Wells* v. *Baird*[1].

The Judicial Committee have held that a Municipality in whom public ways were vested was not entitled to compensation in respect of portions of such ways taken by a tramway company under statutory powers : see *Municipal Council of Sydney* v. *Young*[2].

Reference has been made for the respondents to section 290 of the Municipal Act which provides that whenever any public street or part of it is permanently closed the site may be disposed of as land vesting in the Corporation. That position does not arise in the present case but when it does arise it may have to be determined what it is that the Corporation is disposing of.

It is well established that a railway company acting under section 16 of the Railways Clauses Consolidation Act, 1845 (upon which section 7 of the Indian Railways

(1) [1896] A. C. 434 at p. 442 (2) [1898] A. C. 457.

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Act is closely modelled), by constructing a railway upon and across part of the bed of a navigable river or across a highway is doing what if done by an unauthorized person would be indictable as a nuisance: see *Abraham* v. *Great Northern Railway Company*[1] and *Oliver* v. *North Eastern Railway Co.*[2]. In the latter case the trial Judge told the Jury that as to the duty of the Railway Company with regard to the rails at the level-crossing they must consider the case as if the Company had had the express sanction of an Act of Parliament to put the rails there. In such a case the Company would have power to put down such rails as are necessary for the purposes of the line but the rails must be laid and kept so as to cause as little injury or danger as possible. A rule for new trial on the ground of misdirection was discharged. For a general statement of the obligations of persons interrupting highways under statutory authority see the judgment of Moulton, L. J., in *Hertfordshire County Council* v. *Great Eastern Railway*[3].

In a case analogous to the present where the Corporation of a borough, being empowered by a local Act, which incorporated the Lands Clauses Acts, to erect and maintain "on, in, over, or under" any street in which their tramways were laid poles and posts for the purpose of working the tramways by mechanical power, erected a post for that purpose in the pavement of the street which at that point was the property of a neighbouring owner subject to the right of the public to use the same as a foot-path; it was held that the Corporation were not taking the land within the meaning of section 189 of the Lands Clauses Act, 1845, but were merely exercising statutory power in the nature of an easement.

(1) (1851) 16 Q. B 586

(2) (1874) L. R 9 Q. B. 409.

(3) [1909] 2 K. B 403 at p. 412.

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and an action for trespass could not be maintained against them: see *Escott* v. *Newport Corporation*[1].

The case of *Rangeley* v. *Midland Railway Co.*[2], referred to by the learned trial Judge and relied upon by the respondents, decided that a railway company could not dedicate to the public the surface of a neighbour's land without first acquiring it under the Lands Clauses Act. It does not appear to us to support the plaintiff's position.

The statutory authority under section 7 of the Railways Act to lay the railway across the street without resort to the Land Acquisition Act being in our opinion established, the application of section 293 of the City of Bombay Municipal Act is excluded by the words "notwithstanding anything in any other enactment for the time being in force". The Railways Act, section 16, overrides the Municipal Act and the sole control over the railway administration is vested in the Governor General, see section 16 (2) and *Municipal Commissioner of Bombay* v. *G. I. P. Railway Company*[3]. The evidence so far as it goes indicates that the railway across the Sewri Koliwada Road has the approval of the controlling authority.

We, therefore, reverse the decree of the lower Court and allow the appeal dismissing the suit with costs throughout.

BATCHELOR, J.—I quite agree.

Attorneys for the appellants: *Messrs. Little & Co.*

Attorneys for the respondents: *Messrs. Crawford Brown & Co.*

Appeal allowed.

H. S. C.

(1) [1904] 2 K. B. 369. (2) (1868) L. R. 3 Ch. 306.
(3) (1909) 34 Bom. 252.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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January 28.

CHANDRASHANKAR PRANSHANKAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BAI MAGAN *alias* TULJALAKSHMI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Stamp Act (II of 1899), Schedule I, Article 22—Registration Act (III of 1877), section 17 clause (e)—Trusts Act (II of 1882), section 5—"Composition deed"—Compounding of debts due—Transfer of immoveable property—Registration not necessary.

With the consent of creditors to the extent of Rs. 1,22,000 out of the total number of creditors claiming Rs. 1,61,800 of the family firm represented by one B the latter executed a deed making over all the specified assets of the family to certain nominated trustees. The creditors coming in (by a particular day) under the deed agreed that after all the goods and the properties had been made over to the trustees no other claim whatever with regard to the amounts due to them should remain outstanding against B and the minor members of the family, but the whole claim should be understood to be written off against them, and B and the minors were to make use of the deed as a release passed on their behalf. The deed also provided that the trustees were to manage the properties for the benefit of the creditors interested and the monies realized from time to time were to be distributed among such creditors in proportion to their claims. The properties comprised in the deed, moveable as well as immoveable, were transferred to the trustees in due course. The deed was unregistered.

Subsequently in a suit brought by the trustees to recover possession of a house comprised in the deed, a question having arisen whether the deed was a composition deed,

Held, that the definition of the term "composition deed" as given in Article 22, Schedule I of the Stamp Act (II of 1899), meant the same thing as the term "composition deed" in section 17 of the Registration Act (III of 1877), that the term so defined covered three classes of instruments: (1) An assignment for the benefit of creditors, (2) an agreement whereby payment of a composition or dividend was secured to the creditors and (3) an inspectorship deed for the purpose of working the debtor's business for the benefit of his creditors, that the inclusion of the term "composition deed" in section 17 of the Registration Act (III of 1877) showed that it was intended to apply to a transfer of immoveable property and not to a mere agreement to take fractional payment of money in settlement of claims, that the test of a "composition

* First Appeal No. 254 of 1912.

deed" was that there ought to be a compounding of debts due and that such a deed fell under clause (*e*) of section 17 of the Registration Act (III of 1877) and did not require registration under that Act nor under the provisions of section 5 of the Trusts Act (II of 1882)

Held, accordingly, that the deed in question was a composition deed within the meaning of section 17, clause 2 of the Registration Act (III of 1877), and did not require registration.

FIRST appeal against the decision of N. R. Majmundar, First Class Subordinate Judge of Surat, in suit No. 15 of 1910.

Suit to recover possession of a house and mesne profits.

The circumstances under which the suit was brought were as follows :—

The house in dispute originally belonged to a family firm known as Rajaram Parbhudas. The business of the firm was managed by the eldest member of the family whose name was Nagindas. He carried on the entire trade and other business of the firm very skilfully on a very extensive scale and died in the year 1902 leaving him surviving his widow Radha, two minor sons Motilal and Chunilal, and a brother Bhaidas. Bhaidas assumed the management, but he, apparently having no capacity for business, transferred the entire property of the firm consisting of trade, moveables and immoveables to certain trustees under a deed dated the 21st March 1903 for paying off the debts of the family firm. Under the deed the trustees were to take up in their charge all the properties of the firm including the house in dispute and absolve the family from all its liabilities. But it was agreed between Bhaidas and the trustees that the former should be permitted to reside in the house till the end of the Samvat year 1959 (October 1903) and on the expiration of that period Bhaidas, for himself and on behalf of his minor nephews Motilal and Chunilal, passed a rent note and

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remained in possession till his death which occurred in 1906. After his death his widow Magan and his minor nephews' mother Radha passed a fresh rent note in which his son Varajdas, however, did not join. A notice to quit was served upon them and they having refused to comply with it, the trustees filed the present suit in ejectment. The trustees relied for their title to the house on the deed of transfer passed by Bhaidas and they maintained that it was a composition deed. The material portions of the said deed were as follows:—

To wit Since a long time past my (*i. e.*) Bhaidas Rajaram's father Rajaram Parbhudas was carrying on money lending (business) and the business of the broker, etc., for getting money lent by others in his name And he having died about ten years ago, after his death I and my deceased brother Bhai Nagindas continued the same business in the same name. The said Nagindas took a prominent part in constructing the said business. But during its continuance unfortunately the said Naginbhai died about three and half months ago And now the owners of the said business are by the right of survivorship myself (*i. e.*) Bhaidas and the said Motilal and Chunilal two minor sons of the said Naginbhai And amongst us I the said Bhaidas am the manager of the family and the eldest male member thereof. And as our family is joint the said minors live with me under my care and protection and we all live, eat and drink together.

As regards the business which the said Naginbhai carried on for the benefit of our family after the death of my father Rajabhai Parbhudas he in that business advanced sums of money to people on personal security and also advanced moneys on the pledge of ornaments in his own name as well as in the name of Rajabhai Parbhudas and he also carried on cloth business alone as well as in partnership with others in Surat and other places And in order to conduct the said business he borrowed money from money-lenders on the personal security and also borrowed some money by pledging family ornaments already pledged with him by others And the business which he carried on in this manner was very extensive and complicated. He is now dead as mentioned and I the said Bhaidas am not able enough to carry on the said business further and settle its claims and debts and myself pay off the debts due to creditors, and sons of Naginbhai are minor in age as mentioned above. Therefore it is not possible for them also to continue the family business Taking all these facts into consideration it appeared to me that by continuing the family business for a longer time we as well as the creditors would have to suffer a great loss In consequence thereof after having called a meeting

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of the creditors of the family on the 21st day of December last in the y 1902 in Khan Bahadur Barjorji Nasserwanji Vakil's office I told them all the particulars of my difficulties as mentioned above, and I requested the creditors to take in their possession for their own benefit whatever goods and properties of the family there may be with me, and also the outstanding claims and stock-in-trade, etc., other property belonging to the family whatever the same may be and to free us

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Agreeably to that resolution all of us pass in writing to you the said trustees the formal document of the composition deed with the undermentioned terms :—

We Bhaidas Rajaram and others the present owners of the firm of Sha Rajabhai Parbhudas are indebted to the extent of about Rs 1,61,800 in all Out of the same if creditors to the extent of the sum of Rs. 1 22,000 will sign this document before 12 o'clock in the midnight of the 5th day of April next in the year 1903 this document is duly to come into force But if within that period creditors to the extent of the sum of Rs 1 22,000 will not sign (this document) then this document is to be considered null and void thereafter And in that case whatever cash money, jewellery, documents, account-books and other things which I Bhaidas have made over in charge of you trustees, out of the same you trustees are to again hand over to me Bhaidas after taking from me a receipt in writing whatever balance there may be after deducting thereupon the expenses that may have incurred

2. Only those of the creditors who will sign this document up to 12 o'clock at night on 21st day of April 1903 will get the benefit of this document And in order that all the creditors may thus get information about the document having been made and that they may get an opportunity of signing the same within the said period the said trustees are to give separate notices in public newspapers only by post and to request all the creditors to give the said signature. And it shall also be distinctly stated in the said notices that those who will not sign on this document within 21st day of April 1903 will have no right to the goods and property mentioned in this document

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7. I Bhaidas have goods, property, outstanding claims and jewellery, etc., belonging to our family as specified in Schedule B annexed thereto Whatever goods, property, ornaments, etc., out of the same I have handed over to the members of the Committee prior to this day have been specified in the first part of the said Schedule B and the goods, property and outstanding claims, etc., which are still to be handed over by me are specified in the second part of this very Schedule, besides this I have no other goods or property left with me And should you trustees hereafter find that I have concealed

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from the benefit of all the creditors

8. After signatures of creditors are obtained on this document as mentioned in the clause 1, I Bhaidas am forthwith to make over to you trustees the possession of all goods and property specified in the second part of Schedule B as mentioned below should the amount of their claims have come to Rs. 1,22,000 agreeably to what is mentioned in the said clause and from that

...

and ... servants and heirs shall have no interest left therein

(a) We are to give trustees possession of the immoveable properties specified in Nos 1 and 2 and in Schedule B and which are in our independent possession by vacating the same should you so desire or by passing leases in respect thereof. The sanads of the said houses and the sale deed in respect of a piece of land have been given to you and I have not found other old documents besides these, should however any be hereafter found I am to hand over the same to you. But out of these two houses at Surat a special condition is laid down with regard to our family dwelling houses situated at Kalapith that you are to allow our family to live therein up to the 30th of Aso Vad Samvat 1959 (20th October 1903) in the same manner as it has been living in this house after getting a lease passed by me Bhaidas, and thereafter we are to vacate the said house and make over the same forthwith in your possession and not to raise any dispute or objection with regard thereto.

* * * * * *

9. I the said Bhaidas have made over the whole of the goods and properties and assets belonging to our family for the benefit of the creditors as mentioned above. This being the case our large family has been reduced to an altogether destitute condition, and as I Bhaidas, I am not able to improve that condition at once, I request the creditors to give some support for a short time to our family. Thereupon considering the reputation and destitute condition of our family the creditors who were present at the last meeting passed a resolution to the effect that we should be allowed to live up to Diwali of this year in the dwelling house of our family and that you trustees should pay to me out of this trust property Rs. 40 every month for the maintenance of our family up to the Diwali of the same year, that the trustees should also pay off in full the sundry debts to the extent of Rs. 300 to 350 in respect of provisions which I have bought on credit from miscellaneous merchants for the maintenance

of our family up to now and that the trustees should not take possession of the household material (such as) pots, pans, clothes and wearing apparel, etc, of the value of about Rs. 300—400 belonging to our family but give the same as a present to our children for their use You trustees are therefore to duly carry out the above resolution

10 Immediately I the said Bhaidas give you possession of the property mentioned in the Schedule B belonging to my family as mentioned in clause 7 above you trustees are to duly give me receipt under your signatures in respect of the same. And on my obtaining the said receipt I Bhaidas and the said minors Motilal and Chunilal are to be duly altogether free from the debts due to all the creditors who may have signed this document as also to creditors of the shop of Hodeda And we the creditors also hereby give in writing that after all the above goods and properties are made over to the trustees as mentioned above no other claim whatever with regard to the amounts due to us shall remain outstanding against Bhaidas and minors Motilal and Chunilal but the whole claim shall be understood to have been written off as against them and Bhaidas and minors Motilal and Chunilal and their descendants and heirs are duly to make use of this document against us as a release passed by us in that behalf

11. After all the goods and property have come into possession of you trustees as mentioned above you trustees are duly to manage the same by *right of ownership* for the benefit of all the creditors interested in this document with regard thereto you are to collect the outstanding claims or if any person (debtor) is found out to be in insolvent condition you are to settle the claim against him by accepting a less or larger amount as may be to the utmost possible advantage or should a suit have to be filed against anyone with a view to recover the said amount or should any defence have to be made in any matter these in the name of the trustees you are to do the same or let the properties on rent or sell the same and besides this you are to do all that may have to be done for the benefit of creditors Full authority *is hereby* given to you trustees in that behalf All the moneys that may be recovered from time to time out of the said goods and property that have been made over to you are to be duly distributed by you among such creditors out of those who may have signed this document whose claim may have been decided to be just and within the period of limitation as mentioned above and among the creditors of the shop at Hodeda whose list may have been prepared by you as mentioned above in proportion to their respective claims And all the creditors are duly to give you in writing their respective separate receipts for the amounts which they may receive from you from time to time.

12. You are to sell the goods and property made over to you trustees as early as possible with due regard to the interest of the creditors and by

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any immoveable property or goods or outstanding claim other than the goods and property specified in the second part of the Schedule which are to be handed over by me in charge of the said trustees then you trustees are entitled to obtain from me the goods, property or outstanding claim so concealed by me for the benefit of all the creditors.

8. After signatures of creditors are obtained on this document as mentioned in the clause 1, I Bhaidas am forthwith to make over to you trustees the possession of all goods and property specified in the second part of Schedule B as mentioned below should the amount of their claims have come to Rs 1,22,000 agreeably to what is mentioned in the said clause and from that very date you trustees are duly to be the full owners of all the goods and properties mentioned in the Schedule B by virtue of this document, afterwards I Bhaidas and Motilal and Chunilal or our descendants and heirs shall have no interest left therein.

(a) We are to give trustees possession of the immoveable properties specified in Nos. 1 and 2 and in Schedule B and which are in our independent possession by vacating the same should you so desire or by passing leases in respect thereof. The sanads of the said houses and the sale deed in respect of a piece of land have been given to you and I have not found other old documents besides these, should however any be hereafter found I am to hand over the same to you But out of these two houses at Surat a special condition is laid down with regard to our family dwelling houses situated at Kalapith that you are to allow our family to live therein up to the 30th of Aso Vad Samvat 1959 (20th October 1903) in the same manner as it has been living in this house after getting a lease passed by me Bhaidas, and thereafter we are to vacate the said house and make over the same forthwith in your possession and not to raise any dispute or objection with regard thereto

* * * * * *

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of our family up to now and that the trustees should not take possession of the household material (such as) pots, pans, clothes and wearing apparel, etc., of the value of about Rs 300—400 belonging to our family but give the same as a present to our children for their use You trustees are therefore to duly carry out the above resolution

10. Immediately I the said Bhaidas give you possession of the property mentioned in the Schedule B belonging to my family as mentioned in clause 7 above you trustees are to duly give me receipt under your signatures in respect of the same. And on my obtaining the said receipt I Bhaidas and the said minors Motilal and Chunilal are to be duly altogether free from the debts due to all the creditors who may have signed this document as also to creditors of the shop of Hodeda And we the creditors also hereby give in writing that after all the above goods and properties are made over to the trustees as mentioned above no other claim whatever with regard to the amounts due to us shall remain outstanding against Bhaidas and minors Motilal and Chunilal but the whole claim shall be understood to have been written off as against them and Bhaidas and minors Motilal and Chunilal and their descendants and heirs are duly to make use of this document against us as a release passed by us in that behalf

11. After all the goods and property have come into possession of you trustees as mentioned above you trustees are duly to manage the same by right of ownership for the benefit of all the creditors interested in this document with regard thereto you are to collect the outstanding claims or if any person (debtor) is found out to be in insolvent condition you are to settle the claim against him by accepting a less or larger amount as may be to the utmost possible advantage or should a suit have to be filed against anyone with a view to recover the said amount or should any defence have to be made in any matter these in the name of the trustees you are to do the same or let the properties on rent or sell the same and besides this you are to do all that may have to be done for the benefit of creditors Full authority is hereby given to you trustees in that behalf All the moneys that may be recovered from time to time out of the said goods and property that have been made over to you are to be duly distributed by you among such creditors out of those who may have signed this document whose claim may have been decided to be just and within the period of limitation as mentioned above and among the creditors of the shop at Hodeda whose list may have been prepared by you as mentioned above in proportion to their respective claims. And all the creditors are duly to give you in writing their respective separate receipts for the amounts which they may receive from you from time to time.

12. You are to sell the goods and property made over to you trustees as early as possible with due regard to the interest of the creditors and by

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recovering also the outstanding claims at an early date You are to dispose of this trust in as good time as possible And should any assistance or consent or signatures of us debtors be required at any place hereafter in selling the said properties and goods or in recovering the outstanding claims I Bhaidas on behalf of myself and as guardian of the minors and our descendants and heirs after us (*i. e.* after our death) are duly to give the same without raising any objection whenever you trustees may demand the same.

13 You trustees have full authority to defray out of this trust property the expenses for getting this document prepared as also whatever other just and legal expenses that you trustees may have incurred or may hereafter have to incur in connection with the trust arising out of this document the expenses in connection with any suit that may have to be filed or defended in Court the expenses in connection with the arrears of salaries due to those clerks of the debtors' firm who may have continued after the 21st December and rendered assistance in preparing the books of account and in the expenses in connection with the arrears of the salaries due to the clerks in the shop at Hodeda and the expenses in connection with (the salaries of) men and clerks who may hereafter be employed Similarly should you trustees incur any expenses in connection with this trust out of your own moneys you trustees are entitled to recover the same also first out of the trust property.

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18 We debtors and we their creditors have given this document in writing to you with all the conditions mentioned above. And you trustees also have put your signatures on this document as (a proof of) your consent to undertake the trust mentioned in this document.

The defendants contended *inter alia* that the conveyance to the plaintiffs was not a composition deed, that it was a transfer to trustees for the benefit of creditors and that being unregistered was inoperative, and inadmissible in evidence.

The plaintiffs in their reply stated that the deed was a composition deed and that even if it be not a composition deed on its face, they were prepared to prove it to be so by extrinsic evidence. They further urged that the defendants were estopped from contending that the deed was not a composition deed inasmuch as it was treated as such by Bhaidas and his son Varajdas, the present defendant 2.

The Subordinate Judge found that the deed relied on by the plaintiffs was not a composition deed, that the plaintiffs were not entitled to adduce extrinsic evidence to show that it was a composition deed and that the defendants were not estopped from contending that the deed was not a composition deed. He, therefore, dismissed the suit. The following were some of his reasons :—

It will appear from the above that the family properties were conveyed to trustees, not because Bhaidas was unable to pay off the family debts in full, but because he had no capacity to carry on the family business and because the other male members of the family were minors. That this was the object of executing the conveyance is distinctly admitted in the plaint also. How then can the conveyance be held to be a composition deed? "A composition deed is an agreement made between an insolvent debtor and his creditors by which the latter accept a part of their debts in satisfaction of the whole." (Wharton's Law Lexicon.) In the present case a majority,—a large majority of the creditors became parties to the deed. But the family of Bhaidas was not said to be in insolvent circumstances and the creditors did not agree to accept less than what was due to them. * *

I think, therefore, that the creditors did not agree to compound their dues and take less. I am supported I believe in this conclusion by the fact, the assets exceeded the debts. The outstandings alone amounted to nearly 1,40,000 rupees, Rs. 6833-4-0 were in cash, and the family owned besides a number of ornaments and five immoveable properties. The value of the ornaments and of the immoveable properties is not given in the Schedule B. But there is very little doubt that it could not be inconsiderable. The total debts amounted Rs. 1,56,000 approximately out of which debts amounting to about Rs. 35,000 were secured by a pledge of ornaments. Some of the outstandings may have been time-barred or otherwise become unrecoverable. But the same can be said of the debts also. The deed itself provides that though the Committee had prepared a list of the creditors and ascertained the debts due to them only those debts were to be paid which were proved to be true and within the period of limitation. It is clear therefore to my mind that the creditors did not think that they would not get their dues in full and if that was so, the deed in question is not a composition deed.

The plaintiffs appealed.

Strangman (Advocate General) with *D. A. Khare* for the appellants (plaintiffs):—The deed in ques-

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tion is clearly a composition deed. Under it the creditors claimed rateably and they took the chance of, being paid in full or not. They limited their claims to the properties conveyed by the deed and gave up their debts. The essence of the deed is a composition of creditors' claims, for the creditors agree under it to take anything they may get for the properties and accept what they may get. The Court always favours deeds of this class: *Bamanji Manekji* v. *Naoroji Palanji*[1], *Malukchand* v. *Manilal*[2]. The case of *The Queen* v. *Cooban*[3] is distinguishable, for in that case there was no *cessio bonorum*, similar to the one in this case.

This very deed had come up before the Court on two different occasions. It first came before a bench consisting of Scott, C. J., and Knight, J., in *Fida Alli Mahamad Alli* v. *Chandrashankar Pranshankar*[4],

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(1) (1864) 1 Bom H C R 233. (2) (1904) 28 Bom. 364

(3) (1886) 18 Q. B D. 269

(4) Unreported Second Appeals Nos. 332 and 347 of 1907, decided on the 1st December 1909.

SCOTT, C J. (after setting out the facts, continued) On the 21st of March 1903 a trust and composition deed was signed by the debtors formally making over their property to the trustees for the benefit of their creditors. On subsequent dates the plaintiff and the other creditor who had filed the suit obtained decrees in their suits and applied at once for sale of the houses attached under the conditional order of attachment before judgment.

The debtor then applied to have the attachment raised, but his application was refused on the 15th of June 1903, and on the 30th June a proclamation of sale was issued on the application of one of the plaintiffs which had been made on the 14th June 1903

Thereupon the trustees under the trust and composition deed intervened in order to get the attachment raised, and on the 30th October the attachment was raised

The trustees have sold one of the houses included in the deed of the 6th defendant who is accordingly joined as a party to the suit.

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where it was held to be a composition deed. On the second occasion it came before a bench composed of Chandavarkar and Batchelor, JJ., who held it to be not a composition deed: *Shekh Adam* v. *Chandrashankar*(1).

The term "composition deed" is not defined in the Registration Act, 1908. It is, however, defined in Article 22, Schedule I of the Stamp Act. This definition, which is contained in a kindred Act of Legislature, can be used for ascertaining the meaning of the term. The term was first used in the Registration Act XX of 1866. The term "composition deed" was defined for the first time in the Stamp Act (XVIII of 1869) where the term was defined *to include* "every instrument executed by a debtor, whereby the debtor conveys his property for the benefit of his creditors, or whereby payment of a composition or dividend on their debts is secured to the creditors, or whereby provision is made for the continuance of the debtor's business under the supervision of inspectors, or under letters of

Now it is clear that if the plaintiff has no rights which he can enforce under the attachment obtained by him in December 1902 his suit must fail, for the trust deed under which the trustees claim was a perfectly *bona fide* document of a nature which is much favoured by the Courts see 1 Bom H. C. R, p 233, *Damanji Manikji* v *Naoroji Palanji*, a case which establishes that a *bona fide* assignment by a debtor of his entire property to trustees for the benefit of his creditors divests him of any interest which can be the subject of attachment subsequently issued in execution of a decree against such debtor, until the trusts of the deed of assignment have been carried out

It is not disputed that the conditions have been carried out A trust deed has been regularly made and it bears the signatures of the creditors to whom three-fourths of the total debts are due ° ° °

For these reasons we hold that the provisions of section 276 cannot be effectively called in aid to support the plaintiff's claim, and having regard to the decision of this Court already referred to in 1 Bom. H C. R. the attachment of the judgment-creditor cannot prevail against the title of the trustees under this trust deed

(1) (1912) 14 Bom. L. R 596.

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For these reasons we hold that the provisions of section 276 cannot be effectively called in aid to support the plaintiff's claim, and having regard to the decision of this Court already referred to in 1 Bom H C. R. the attachment of the judgment-creditor cannot prevail against the title of the trustees under this trust deed

(1) (1912) 14 Bom L. R 506.

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license, for the benefit of his creditors". In the next Stamp Act (I of 1879), the entire definition is preserved with the difference that instead of "includes" the words "that is to say" are used, Article 22. The deed in question evidently falls within this definition.

Inverarity and *Weldon* with *N. K. Mehta* for the respondents (defendants):—The first Registration Act XVI of 1864 contains no mention of composition deed. It was first introduced in the Registration Act XX of 1866, section 17, and it has since appeared in all subsequent Registration Acts. The early Stamp Acts XXXVI of 1860 and X of 1862 provided for composition deeds but contained no definition of the term. The definition was first introduced in the Stamp Act XVIII of 1869 and then, with a slight change made in it, in the Stamp Act I of 1879. It has appeared in all subsequent Stamp Acts.

The term "composition deed" is used in the Registration Act in its proper legal sense. In the Stamp Act of 1869, the Legislature subsequently enlarged the meaning of the term and made it to *include* certain things The Stamp Act is not in *pari materia* with the Registration Act and there is no indication that the Legislature intended to alter the meaning of "composition deed" in the Registration Act. In England, a deed of arrangement is not regarded as a composition deed: see 50 and 51 Vic., c. 57, s. 4, see also *Baines* v. *Wright*[1].

Composition deeds are not favourably regarded by the Courts. It has been held that an assignment by debtor of his property to his creditors is an act of bankruptcy.

The present deed is no composition deed. The debtor was not insolvent. There is no recital that he

[1] (1885) 16 Q B D 330

was not able to pay his debts, but that he was unable to carry on the business. The trust was for such of his creditors as came in under the deed by a particular date. It was not for the benefit of all his creditors. It seems that under the deed the creditors would be paid in full, and if there was a surplus, it was also to go to them. It was thus a deed of arrangement by which it was thought the creditors would be paid in full if the business was allowed to be carried on by trustees: see Halsbury's Laws of England, Vol. II, p 326, *The Queen* v. *Cooban*(1).

[Scott, C. J., referred to *Subbaraya* v. *Vythilinga*(2) and *Aslatt* v. *Corporation of Southampton*(3).]

Strangman, in reply

SCOTT, C. J.:—This suit was filed by the plaintiffs to obtain possession of a certain dwelling house according to the terms of a deed executed on the 21st March 1903 by Bhaidas Rajaram for himself and members of his family. By that document it was recited that it had been resolved at a meeting of creditors that if creditors of the family firm represented by Bhaidas to the extent of a sum of Rs. 1,22,000 out of the total number of creditors claiming Rs. 1,61,800 should sign the deed before midnight on the 5th March 1903. Bhaidas should make over to the trustees all the assets of the family specified in Schedule B, subject to a special condition regarding the family houses at Kalapith, namely that the trustees should allow the family to live therein up to the 20th of October 1903 in the same manner as it had been living there after getting a lease passed by Bhaidas, and that thereafter the family should take the house and make over the same forthwith into the possession of the trustees. By the 9th clause it was stated that Bhaidas

(1) (1886) 18 Q B D 269.
(2) (1892) 16 Mad. 85.
(3) (1880) 16 Ch D 143

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was not able to pay his debts, but that he was unable to carry on the business. The trust was for such of his creditors as came in under the deed by a particular date. It was not for the benefit of all his creditors. It seems that under the deed the creditors would be paid in full, and if there was a surplus, it was also to go to them. It was thus a deed of arrangement by which it was thought the creditors would be paid in full if the business was allowed to be carried on by trustees, see Halsbury's Laws of England, Vol. II, p. 32; *The Queen* v. *Cooban*[1].

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Stranaman, in reply

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having made over the whole of the trust properties and assets belonging to the family for the benefit of the creditors the family was reduced to a destitute condition, and therefore the creditors passed a resolution to the effect that they should be allowed to occupy the dwelling house as aforesaid and that the trustees should pay an allowance of Rs. 40 a month to Bhaidas up to the same date, namely the 20th of October, and the creditors coming in under the deed agreed that after all the goods and properties had been made over to the trustees no other claim whatever with regard to the amounts due to them should remain outstanding against Bhaidas and the minor members of his family, but the whole claim should be understood to be written off against them, and Bhaidas and the minors were to make use of the deed as a release passed by them on their behalf, and by subsequent clauses it was provided that the trustees were to manage the properties for the benefit of all the creditors interested, and the monies realized from time to time were to be distributed amongst such creditors in proportion to their claims. The period during which the occupation of the dwelling house was permitted to Bhaidas and his family has long since expired, but a notice to quit having been served upon them they refused to comply with it and the present suit was therefore instituted to eject them.

The deed was not registered, and objection was taken at the hearing that it was inoperative in respect of the immoveable properties mentioned in Schedule B, and that therefore the title of the plaintiffs to the house in question was not established.

If the document is a composition deed within the meaning of the Registration Act it does not require registration (see section 17, clause (*e*)). This very document has twice come before the High Court in previous litigation, on one occasion before a bench

consisting of myself and Mr. Justice Knight and on another occasion before a bench consisting of Sir Narayan Chandavarkar and my present colleague Mr. Justice Batchelor. In the first case the deed was held to have passed the property to the trustees so as to defeat an attaching creditor who attached subsequent to the execution of the deed, and in the judgment the deed is referred to as a trust and composition deed. In the second case the trustees sought to recover rent from the tenants of certain immoveable property mentioned in the Schedule to the deed, but it was held that the document was compulsorily registrable, and not having been registered it could not be admitted in evidence. The Court there said: "There is nothing whatever in the language of the deed to show that there was any composition, any settlement with the creditors that the debtor should pay less than he owed to them and that they agreed to accept that composition. The essential test of a composition deed is that there ought to be a compounding of debts due. Of that there is no trace whatever so far as the language of this document is concerned": *Shekh Adam* v. *Chandrashankar*[1]. It does not appear from the record which we have examined that any translation of the deed was supplied to the Court. The Court's opinion appears to have been based upon *The Queen* v. *Cooban*[2], where the question was whether a *cessio bonorum* for the benefit of creditors by a document which incorporated a release by the creditors was a composition deed within the meaning of certain Municipal rules so as to disqualify the debtor from election to a Municipal office.

In the first case disposed of by myself and Mr. Justice Knight it was not disputed that the deed now before us was a composition deed. In the second case though it was disputed, the Court was not referred to a definition

(1) (1912) 14 Bom. L. R 506

(2) (1886) 18 Q B D. 269.

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of the term "composition deed" which is to be found in the Acts of the Indian Legislature. That definition we have now been referred to and much reliance is placed upon it. It is the definition which has been found in all the general Stamp Acts of the Government of India from 1869 up to the present time. It is now to be found in Article 22 of Schedule I of Act II of 1899, and it runs as follows :—"Composition-deed, that is to say, any instrument executed by a debtor whereby he conveys his property for the benefit of his creditors, or whereby payment of a composition or dividend on their debts is secured to the creditors, or whereby provision is made for the continuance of the debtor's business, under the supervision of inspectors or under letters of license for the benefit of his creditors." That definition covers three classes of instruments: (1) an assignment for the benefit of creditors; (2) an agreement whereby payment of a composition or dividend is secured to the creditors; (3) an inspectorship deed for the purpose of working the debtor's business for the benefit of his creditors. It is not disputed that the deed now before us falls under the first class, and it is contended on behalf of the appellants that it also falls under the second class in that the creditors compound by giving a release for their debts in consideration of the assignment of property the proceeds of which are to be distributed rateably among them, whether or not such proceeds are more or less than the amount of their claims; and it is argued that the Stamp Act is a Statute in *pari materia* with the Registration Act and that the definition contained therein should be used for the purpose of interpreting section 17, clause (*e*) of the Registration Act.

Now the exemption of composition deeds from the compulsory provisions of the Registration Act dates from the Registration Act of 1866 and has been continued

through all subsequent Registration Acts up to the present time. The question, therefore, is whether the term "composition deed" was either in ordinary parlance or in the understanding of lawyers limited so as to exclude an assignment in trust for the benefit of creditors, the creditors being parties and releasing their claims. A reference to Murray's Dictionary will show that in ordinary parlance a compounding or composition of claims does not necessarily exclude a general agreement for settlement of debts, although no exact sum may be arrived at as the amount of the settlement, and the case of *Bamanji Manikji* v. *Naoroji Palanji*[1] decided in 1864 shows that the Chief Justice thought that the agreement whereby the property of the trader was assigned to trustees for the benefit of the creditors signing the trust deed was a composition deed. Why then should it be assumed that the Legislature in enacting the Registration Act of 1866 intended that the term should have some more restricted signification? It appears to me that the definition in the Stamp Act may be taken as an indication that the Legislature had no such intention. The Stamp Act may not be strictly speaking in *pari materia* with the Registration Act, but a lawyer preparing a deed such as we have here for an insolvent client or for his creditors would have first to see what stamp was required upon the document and *for that purpose would have to look at the definitions* in the Stamp Act and after having got the document duly stamped would have to consider whether it required registration. It would be a very extraordinary thing if the Legislature intended that the term "composition deed" in the Registration Act should mean something else than the same term in the Stamp Act and the inclusion of the term in section 17 of the Registration Act shows it was intended to apply to a transfer of

(1) (1864) 1 Bom. H. C. R. 233.

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immoveable property and not to a mere agreement to take fractional payment of money in settlement of claims. The decision of this Court in *Shekh Adam* v. *Chandrashankar*[1] states the test of a composition deed to be that there ought to be a compounding of debts due. It appears to me that judged by this test the document in question would be a composition deed.

In *Pennell* v. *Rhodes*[2] Patteson, J., said: "I think that, under the Statute, (5 and 6 Vic., c. 122, s. 14) compounding is an arranging with the creditor to his satisfaction. If there is a binding arrangement for discharge of the debt, from which neither party can recede, and with which the creditor is satisfied, it is a compounding, though something still remains to be done." The case of *Malukchand* v. *Manilal*[3] decided by Chandavarkar and Batty, JJ., appears to me to support the same conclusion. There the debtor passed a document whereby three persons were appointed trustees which was signed by the debtor and some of his creditors, but not registered, and by it the judgment-debtor made over to the trustees his immoveable property, goods and the account-books for sale on the day he signed the deed. The Court there said (page 369): "Certain immoveable and moveable property of the debtor and his account-books are vested in the trustees for the purpose of paying his creditors. There is no conveyance of the immoveable property of the debtor to the creditors. Under these circumstances we think the lower Courts were right in holding that the deed fell within the exemption of clause (*e*) of section 17 of the Registration Act. The deed recites that the composition is for the benefit of *all* the creditors and all of them are to derive equal benefit from it."

(1) (1912) 14 Bom. L. R. 503. (2) (1846) 9 Q. B 114 at p. 129.

(3) (1904) 28 Bom. 364.

It does not appear to me that the decision of the Queens Bench Division in *The Queen* v. *Cooban*[1] affords any assistance in the present case. The words of the rule were held to have a particular and restricted implication, and an earlier case of *Aslatt* v. *Corporation of Southampton*[2], decided by Sir George Jessel, shows how special words in such a connection may limit the ordinary notion of compounding. In my opinion the document falls within clause (*e*) of section 17 of the Registration Act and did not require registration, nor does it, for the reasons given in *Malukchand's case*[3]. require registration under the provisions of section 5 of the Trusts Act of 1882. I would therefore reverse the decree of the lower Court and remand the case for trial after admission in evidence of the deed in question. Costs costs in the cause.

BATCHELOR, J. :—The only question before us is whether the document Exhibit 67 is a "composition deed" within the meaning of section 17 of the Registration Act. The document after reciting that the family business, which Naginbhai had carried on in his life, was "very extensive and complicated", continues :— "He (Naginbhai) is now dead and I, Bhaidas, am not able enough to carry on the said business further and settle its claims and debts, and myself pay off the debts due to creditors; and the sons of Naginbhai are minors; therefore it is not possible for them also to continue the family business. Taking all these facts into consideration, it appeared to me that by continuing the family business for a longer time we as well as the creditors would have to suffer a great loss." In consequence of these considerations it is then set out, in paragraph 9 of the deed, which in the original Gujarati is called a "composition deed", that "I, the

(1) (1886) 18 Q. B. D. 269 (2) (1880) 16 Ch. D. 143
(3) (1904) 28 Bom. 364.

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said Bhaidas, have made over the whole of the goods and properties and assets belonging to our family for the benefit of the creditors." Paragraph 10 provides that "we the creditors also hereby give in writing that after all the above goods and properties are made over to the trustees as mentioned above, no other claim whatever with regard to the amounts due to us shall remain outstanding against Bhaidas and the minors, but the whole claim shall be understood to have been written off as against them; and Bhaidas and the minors and their descendants are duly to make use of this document against us as a release passed by us in that behalf." Then in paragraph 11 there is a provision that the trustees are to devote the proceeds of the trust properties to the payment of the creditors "in proportion to their respective claims", as the original is officially translated. It may be observed, however, upon this phrase that the Gujarati does not necessarily bear the precision of meaning conveyed by the English rendering, and may mean no more than that payments are to be made to the creditors "in regard or relation to their claims".

In *Shekh Adam* v. *Chandrashankar*[1] it was held by my brother Chandavarkar and me that this deed was not a composition deed, but a mere *cessio bonorum* or deed of arrangement assigning Bhaidas's property to trustees for the payment of the creditors. I still think that that decision was right on the arguments which were then submitted to us, and I venture to doubt whether in English Law, from which the technical expression is derived, this document would be held to be a 'composition deed'. It is not, in my opinion, substantially distinguishable from the deed which in *The Queen* v. *Cooban*[2] was held by Denman and Hawkins, JJ., to be not a composition deed. The reasons

[1] (1912) 14 Bom. L. R. 506

[2] (1886) 18 Q. B. D. 269.

for which the deed in that case was held to be not a composition deed are, I think, exactly applicable to the deed in this appeal, for, to use the words of Hawkins, J., there is not "anything to show that the property which the debtor has assigned will not produce 20 shillings in the pound for his creditors. It contains no provision by which any one creditor can be compelled to take less than 20 shillings in the pound if he can get it, for all the property is to be divided, and there is no obligation on any creditor to take less than the full amount of his debt. The deed, therefore, does not bind the creditors to take less than the full amount of their debts, and it cannot properly be called an arrangement for a composition; it is in fact an assignment of all his property by the debtor for the benefit of his creditors, who, however, are not asked to make any sacrifice; but who are authorised to divide all the debtor's property amongst themselves". If, then, the matter rested here, I should feel bound to hold that the deed in suit is not a composition deed for the simple reason that a composition deed is a deed which compounds, and this deed does not compound. The assignor, moreover, does not even profess to be insolvent, but the arrangement is made merely to avoid a possible loss in the future.

The only consideration which moves me now, not without hesitation, to abandon this opinion is a consideration which was not placed before the Court when the case of *Shekh Adam* v. *Chandrashankar*[1] was decided: I mean the definition enacted by the Indian Legislature in Article 22 of Schedule I of the Indian Stamp Act, 1899. For "composition deed" is there defined as meaning *inter alia* "any instrument executed by a debtor whereby he conveys his property for the benefit of his creditors". Having regard to this definition, to the fact that the Stamp Act is in large

[1] (1912) 14 Bom. L. R. 506.

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measure *in pari materia* with the Registration Act, and to the favour with which such deeds are regarded by the law, I think the better opinion is that the deed in controversy here is a composition deed within the meaning of the Indian Registration Act.

Mr. Inverarity has pointed out that when in 1866 the first Indian Registration Act was passed which exempted composition deeds, there was no statutory definition of "composition deed" either in the then prevailing Stamp Act or elsewhere; and there is much force in the consequent argument that when a composition deed was first exempted from registration by the Legislature, what was exempted must have been a composition deed as the phrase was understood by English lawyers, and that the undefined phrase was retained, preserving this original meaning, in the successive Registration Acts *per in curiam* of the special definition which in the meanwhile had crept into the Stamp Act. But to read the two Acts in this way would come very near to reading them as if the Legislature had created traps not only for the unwary, but for the reasonably wary; and, whatever the Legislature may have intended in fact, I think that any time after the Stamp Act of 1869, which first enlarged the phrase by statutory definition, it must be taken to have intended that the "composition deed" of the concurrent Registration Act should bear the same meaning. It is open to the Indian Legislature, if it think fit, to enact that a mere *cessio bonorum* shall for certain purposes be regarded as a composition, and, having regard to the definition in the Stamp Act, I conceive that that is what has happened in reference to the phrase as used in the Registration Act.

For these reasons I agree that the deed in suit is exempt from the necessity of registration.

Decree reversed and case remanded.

G. D. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Davar.

BAI FATMA (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE RANDER MUNICIPALITY (ORIGINAL DEFENDANT), RESPONDENT.* 1914 *March 4*

Bombay District Municipal Act (Bom. Act III of 1901), sections 92, 96†—Erection of a new building—Application to Municipality for permission—Condition requiring the owner to keep certain space vacant for widening street—Condition not valid.

The plaintiff applied to the Municipality for permission to rebuild her house. The Municipality granted the permission on the condition, among others, that

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* Second Appeal No. 383 of 1913.

† Sections 92 and 96 of the Bombay District Municipal Act (Bom. Act III of 1901) are as follows :—

92. (1) If any part of a building projects beyond the regular line of a public street either as existing or as determined upon for the future, or beyond the front of the building on either side thereof, the Municipality may—

(*a*) * * * *

(*b*) * * * *

require by written notice either that the part, or some portion of the part, projecting beyond the said regular line or beyond the said front of the adjoining building on either side thereof, shall be removed, or that such building when being rebuilt shall be set-back to or towards the said regular line or the front of such building. And the portion of the land added to the street by such setting back or removal shall thenceforth be deemed part of the public street and be vested in the Municipality.

(2) * * * *

(3) Compensation, the amount of which shall in case of dispute be ascertained and determined in the manner provided in section 160, shall be paid by the Municipality to the owner of any land added to a street under sub-section (1) or acquired under sub-section (2) for the value of the said land and to the owner of any building for any loss damage or expense incurred by such owner in consequence of any action taken by the Municipality under either of the said sub-sections * * *.

96. (1) Before beginning to erect any building, or to alter externally or add to any existing building, or to reconstruct any projecting portion of a building in respect of which the Municipality is empowered by section 92 to enforce a

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she should in rebuilding the house keep a specified space vacant and unbuilt upon for the improvement of the street by widening it. The plaintiff disregarded the condition and built upon the specified space. Thereupon the Municipality having threatened the demolition of the house, the plaintiff brought the present suit for an injunction restraining the Municipality from doing so.

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removal or set-back, the person intending so to build, alter, or add shall give to the Municipality notice thereof in writing, and shall furnish to them, at the same time, if required by a by-law or by a special order to do so,

(a) the sanad, if any, ° ° °

(b) a plan showing the levels, at which the foundation and lowest floor of such building are proposed to be laid, by reference to some level known to the Municipality, and all information they may require regarding the limits, design, ventilation and materials of the proposed building, and the intended situation and construction of the drains, sewers, privies, water-closets and cesspools, if any, to be used in connection therewith, and the location of the building with reference to any existing or projected streets.

(2) The Municipality may issue such orders not inconsistent with this Act as they think proper with reference to the work proposed in such notice and may either give permission to erect or alter or add to the building according to the plan and information furnished, or may impose in writing such conditions as to level, drainage, sanitation, materials, or to the dimensions and cubical contents of rooms, doors, windows and apertures for ventilation, or with reference to the location of the building in relation to any street existing or projected, as they think proper, or may direct that the work shall not be proceeded with unless and until all questions connected with the respective location of the building and any such street have been decided to their satisfaction

(3) ° ° ° °

(4) ° ° ° °

(5) Whoever begins or makes any building or alteration or addition without giving the notice required by sub-section (1), or without furnishing the documents or affording the information above prescribed, or except as provided in sub-section (4), without awaiting, or in any manner contrary to, such legal orders of the Municipality as may be issued under this section, or in any other respect contrary to the provisions of this Act or of any by-law in force thereunder, shall be punished with fine which may extend to one thousand rupees: and the Municipality may

(a) direct that the building, alteration, or addition be stopped, and

(b) by written notice, require such building, alteration or addition to be altered or demolished as they may deem necessary.

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Held, that under section 96 of the Bombay District Municipal Act (Bom. Act III of 1901) the Municipality was empowered to prescribe the location of the building in relation 'to any street existing or projected as they think proper,' whereas in the present case they had prescribed the location of the building in relation, not to the existing street, but to a street which might come into existence in the future. The object of the Municipality in imposing the condition was not for the purposes of sanitation or ventilation but to get a set-back which could not be obtained under section 92 of the Act.

If the condition of the permit were complied with, the plaintiff would have to give up or keep vacant or unproductive a considerable portion of her land and the Municipality would have the opportunity of paying compensation for it at any time they might feel disposed to do so, which would be contrary to the provisions of section 92 which contemplates that when a set-back is determined upon compensation should be paid to the owner and that the plaintiff was entitled to an injunction as prayed.

Queen-Empress v. *Veerammal*[1], referred to.

SECOND appeal against the decision of M. S. Advani, District Judge of Surat, confirming the decree of Naginlal V. Desai, Joint Subordinate Judge.

The plaintiff sued for an injunction restraining the defendant Municipality from carrying out the threat held out by the latter to demolish the plaintiff's building described in the plaint which alleged that the plaintiff had, on the 25th April 1911, applied for permission of the defendant Municipality to rebuild her house, that the plaintiff having received no reply to that application from the defendant within one month, she commenced the building work, that about a month after the work had been in progress, that is, on the 5th June 1911, a permission was sent to the plaintiff which required her to set-back a portion of the house but as the building work had already advanced, the plaintiff was not able to comply with the said requisition and that the defendant having served the plaintiff with a notice, dated the 12th September 1911, of the demolition of the house, the

[1] (1892) 16 Mad 230

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plaintiff brought the present suit on the 27th November 1911 praying for an injunction.

The defendant Municipality answered that on the 23rd May 1911 a reply to the plaintiff's application was tendered to the plaintiff's son who was her agent, but he having refused to take it on that day and even on the next day, it was arranged to affix the reply to the house when the plaintiff's son accepted it on the 5th June 1911, that as the plaintiff began the building work before she obtained the defendant's permission, her action was in contravention of the provisions of the District Municipal Act and the defendant's order and that the defendant had, therefore, a right to demolish the plaintiff's house.

The Subordinate Judge found that the reply to the plaintiff's application dated the 25th April was offered to plaintiff's son on or before the 25th May 1911 as alleged by the defendant and that it was "served within a month" of the application, that the defendant had the power to pass the order as it had done, that the injunction asked for by the plaintiff could not be granted and that the plaintiff had commenced the proposed building without awaiting the orders of the defendant upon the application for permission to build which was made by her on the 25th April 1911. He, therefore, dismissed the suit observing :—

It was contended that defendant had no power to order plaintiff to leave open a *space* as was done in Exhibit 38 since there was no regular line of a public street determined upon in that locality Defendant admits that the order is not passed under section 92 (see purshis Exhibit 15) but is one passed under section 96, sub-section (2), and on a consideration of the words now in that sub-section (*viz.*, or with reference to the location of the building in relation to any street existing), I think the order given was legal and not inconsistent with Act III of 1901 The order to plaintiff is to so locate her building as to leave a certain open space to the south of it and this I think the Municipality has power to do. Supposing for purposes of sanitation of the town or the locality a Municipality thinks it necessary to ask an owner who

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wants to rebuild his whole house to build it, but to so build it as to leave an open space say a small compound in front or at the back has it or has it not got the power to ask him to do so? I think the words quoted by me give the power in question for the owner in that case, would be asked to locate his building, i.e., the main structure in a particular position The open space left out under such a direction would continue no doubt to be the property of the owner and he may use it in any way he likes so long as he does not *build* upon it.

The result then is that defendant's notice to plaintiff (Exhibit 48) is quite according to the authority vested in it by law and I therefore refuse to grant any injunction as prayed for

On appeal by the plaintiff, the District Judge confirmed the decree. He remarked :—

It now remains only to consider whether the action of the respondent is legal. Under section 96 clause 2 of the Municipal Act the respondent had authority to issue orders regarding the location of the building in relation to any street existing and where the order made is not obeyed the respondent has the authority to order demolition, under clause 5 of the same section. As the order made is not oppressive I am of opinion that the respondent can proceed to execute it

The plaintiff preferred a second appeal.

Inverarity with *Manubhai Nanabhai* for the appellant (plaintiff):—The condition in the permit requiring us to keep open a space of 5 feet 8 inches in width is illegal. It is admittedly not made under section 92 of the District Municipal Act No regular line has been laid down and the other conditions of section 92 are not fulfilled. Set-back cannot be required for widening a street but only to make its line regular: *Essa Jacob* v. *Municipal Commissioner of Bombay*[1].

The Municipality, however, relies upon its powers under section 96 (2) of the said Act The section empowers the Municipality to impose such conditions with respect to the location of the building in relation to any street existing or projected as they think proper. But it is provided at the same time that such orders should not be inconsistent with the provisions of

[1] (1900) 25 Bom 107 at p. 110.

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sections 90 and 92 of the Act. The order would be to set-back the house without any compensation being paid to the owner, while sections 90 and 92 require the Municipality to pay compensation forthwith: *Queen-Empress* v. *Veerammal*[1], The Madras District Municipal Act (Mad. Act IV of 1884), sections 158, 180.

The present case is distinguishable from the cases where for the sanitation of the house to be rebuilt, and not for the sanitation of the town, the Municipality requires a space to be kept open as fully as in *Municipality of Thana* v. *Fazal Karim*[2].

Strangman (Advocate General) with *M. K. Mehta* for the respondent (defendant):—The condition is imposed under the powers given by clause 2, section 96 of the District Municipal Act. The Municipality may, for sanitary purposes or for ventilation, require a certain space to be kept open as in over-crowded areas. No street is yet projected, but the Municipality may fix the location of the building with reference to the existing street. The house is set-back, but there is no set-back in the sense used in section 92, as the land is only to be kept open by the owner. He is only prohibited from building upon it. It continues to be his property. He can use it as his garden or compound. For this, no compensation need be paid. The plaintiff will get the compensation when the Municipality may, at any time hereafter, take the space for widening the street. The conditions required for a set-back under section 92 do not exist at present, so the Municipality cannot acquire the land and cannot be called upon to pay compensation for it.

SCOTT, C. J.:—The plaintiff being the owner of a house in Rander applied to the Municipality for permission to rebuild it on the 25th of April 1911. The Municipality in reply to her application on the 5th of

(1) (1892) 16 Mad 230. (2) (1901) 3 Bom. L. R. 842.

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portion of her land, and the Municipality would have the opportunity of paying compensation for it at any time they might feel disposed to do so, which would be contrary to the provisions of section 92 which contemplate that when a set-back is determined upon compensation shall be paid to the owner. The case is very similar to *Queen-Empress* v. *Veerammal*[1]. We think that the plaintiff is entitled to the relief which she prays, namely, an injunction restraining the defendants from pulling down the building, or any portion thereof, or from putting in force their notice of the 12th of September 1911. The defendants must pay the costs throughout. The decree of the lower appellate Court is set aside.

Decree set aside.

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[1] (1892) 16 Mad. 230.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Davar.

1914. *March 6.*

MANILAL POPATLAL HEIR OF DECEASED SHAH CHHAGANLAL (ORIGINAL PETITIONER AND DECREE-HOLDER), APPELLANT, v. KHODABHAI SARTANSANG AND ANOTHER (ORIGINAL OPPONENTS AND JUDGMENT-DEBTORS), RESPONDENTS.*

The Gujarat Talukdars' Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905), section 29 and section 29B (1), (2), (3) and 29E†—Suit upon a mortgage—Talukdari Settlement Officer—Guardian of the minor defendants

* Second Appeal No. 342 of 1912.

† Section 29 and section 29B (1), (2), (3) and 29E of the Gujarat Talukdars' Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905) are as follows:—

29. (1) When any talukdari estate is taken under management by Government officers under any of the three last preceding sections, the provisions of section 160 of the Bombay Land Revenue Code, 1879, shall be applicable thereto.

(2) * * * * * *

(3) * * * * * *

—Proceedings up to second appeal—Intermediate notification by the said Officer calling upon claimants to submit their claims within six months—Plaintiff's non-compliance with the notification—Plaintiff's application to the said Officer for a certificate to execute the decree—Refusal of the application—Inability to comply with the notice—The word "inability" not confined to physical inability of the claimant.

29B (1) Where any talukdari estate has been taken under management by Government officers under section 26 or 28 the managing officer may publish in the *Bombay Government Gazette* and in such other manner as the Governor in Council may by general or special order direct, a notice, in English and also in the vernacular, calling upon all persons having claims against such talukdar or his property to submit the same in writing to him within six months from the date of the publication of the notice

(2) Where the managing officer is satisfied that any claimant was unable to comply with the notice published under sub-section (1), he may allow his claim to be submitted at any time after the date of the expiry of the period fixed therein but any such claim shall, notwithstanding any law, contract, decree or award to the contrary, cease to carry interest from the date of the expiry of such period until submission

(3) Every claim against such talukdar or his property (other than a claim on the part of Government) not submitted to the managing officer in compliance with the notice published under sub-section (1), or allowed to be submitted under sub-section (2) shall, save in the cases provided for by section 29E, sub-section (2), clause (*c*), and by sections 7 and 13 of the Indian Limitation Act, 1877, be deemed for all purposes and on all occasions, whether during the continuance of the management or afterwards, to have been duly discharged, unless in any suit or proceeding instituted by the claimant, or by any person claiming under him, in respect of any such claim, it is proved to the satisfaction of the Court that he was unable to comply with the notice published under sub-section (1)

29E. (1) On the publication of a notice under section 29B, sub-section (1), no proceeding in execution of any decree against the talukdar whose estate is taken under management or his property shall be instituted or continued until the decree-holder files a certificate from the managing officer that the decree claim has been duly submitted, or until the expiration of one month from the date of receipt by the managing officer of a written application for such certificate, accompanied by a certified copy of the decree.

(2) Any person holding a decree against such talukdar or his property shall be entitled to receive from the managing officer, free of cost, the certificate required by sub-section (1)

(3) ° ° ° ° ° °

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In 1904 the plaintiff sued the defendants, who were minors represented by the Talukdari Settlement Officer as their guardian, for a decree upon a mortgage. The first Court held the mortgage to be invalid under the provisions of the Gujarat Talukdars' Act (Bom Act VI of 1888) and granted to the plaintiff a personal decree. On the 27th September 1905 the plaintiff appealed to the District Court against the said decree and a notice of the appeal was issued to the Talukdari Settlement Officer. On the 21st November following the Talukdari Settlement Officer took over the management of the defendants' estate The notice of the appeal was served on that Officer on the 24th of the same month. On the 28th December 1905 the Talukdari Settlement Officer issued a notification under section 29B of the Gujarat Talukdars' Act (Bom Act VI of 1888 as amended by Bom. Act II of 1905) calling upon claimants to submit their claims within six months of the date of the notification On the 14th March 1906 the District Court decided the plaintiff's appeal and modified the decree of the first Court by holding that the plaintiff had a valid mortgage upon the property of the defendants On the 16th of the same month a copy of the appellate decree was sent to the Talukdari Settlement Officer on the application of his office. In July 1906, that is, after the expiry of the period of six months given under the notification of the 28th December 1905, the Talukdari Settlement Officer as representing the defendants preferred a second appeal to the High Court against the District Court's decree The second appeal having failed in August 1907, the plaintiff applied to the Talukdari Settlement Officer for a certificate in order that he might proceed with the execution of the decree and he was informed in reply on the 12th August 1908 that as he had not submitted his claim within six months of the date of the publication of the said notification, his claim was deemed to have been duly discharged and no certificate could be granted to him One month after the date of the receipt of the said reply, the plaintiff applied for execution and both the lower Courts dismissed his application for execution on the ground that the want of a certificate under section 29E of the Gujarat Talukdars' Act (Bom. Act VI of 1888 as amended by Bom Act II of 1905) was a valid bar to the execution.

On second appeal by the plaintiff,

Held, that the word "unable" in section 29B of the Gujarat Talukdars' Act (*Bom. Act VI of 1888* as amended by Bom Act II of 1905) was not confined to physical inability on the part of the claimant, that the plaintiff was unable to put forward his real claim at the date of the notification and at the date of the notice he was unable to comply with it within the meaning of section 29B (3) of the Gujarat Talukdars' Act (Bom Act VI of 1888 as amended by Bom Act II of 1905), and that the inability of the plaintiff having continued during the period of the six months from the date of the notification, the plaintiff was not barred by section 29B from prosecuting the proceedings in Court.

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SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the order passed by P. C. Desai, Subordinate Judge of Dhandhuka, in an execution proceeding.

The facts were as follows:—

Chudasa Sartansang Bawabhai, a Garasia of Gujarat, had a mortgage lien over a certain field which was the property of Bhimji Sajabhai and others. He mortgaged the said lien to Shah Chhaganlal Kishordas for Rs. 1,400 under a registered deed dated the 27th October 1898. In the year 1904 Shah Chhaganlal brought a suit, No. 284 of 1904, in the Court of the Subordinate Judge of Dhandhuka against the legal representatives of his mortgagor Sartansang, deceased, to recover Rs. 2,360 due under the mortgage. Some of the defendants being minors, they were represented in the suit by the Talukdari Settlement Officer of Gujarat. The Subordinate Judge found that the mortgage was invalid under the provisions of the Gujarat Talukdars' Act and on the 24th August 1905 passed a decree against the defendants personally.

On the 27th September 1905 the plaintiff appealed to the District Court. Notice of the appeal was served on the Talukdari Settlement Officer on the 24th November following as that Officer had, on the 21st November, taken over the management of the defendants' estate under the Gujarat Talukdars' Act.

On the 28th November 1905 the Talukdari Settlement Officer issued a notification under section 29B of the Gujarat Talukdars' Act Amendment Act, calling upon the claimants to submit their claims to him within six months of the date of the said notification.

The plaintiff's appeal to the District Court was decided by that Court on the 16th March 1906. The District Court modified the decree of the first Court and

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held that the plaintiff had a valid mortgage on the defendants' property.

The Talukdari Settlement Officer preferred a second appeal to the High Court and the said second appeal failed on the 7th August 1907: see *Khodabhai* v. *Chaganlal*[1].

The plaintiff subsequently applied to the Talukdari Settlement Officer for a certificate under section 29E of the Act in order that he may proceed to execute the decree, but that Officer declined to give him the certificate on the ground that as the plaintiff (claimant) did not submit his claim within six months of the date of the notification, the claim was deemed to have been fully discharged.

The plaintiff, thereupon, applied to the Court to execute the decree.

The Subordinate Judge dismissed the application holding that the want of a certificate under section 29E of the Act was a valid bar to execution.

On appeal by the plaintiff the District Judge confirmed the decree on the following ground :—

As I understand the law notice of all claims is to be given within six months If those claims have not yet been decided on by a tribunal but are then under trial a certified copy of the plaint is to be submitted to the Talukdari Settlement Officer. When the litigation ultimately emerges into a decree the decree-holder cannot execute it during management until the decree-holder files a certificate from the managing officer that the decree claim has been duly submitted or until one month from the date of receipt by the managing officer of a written application for such a certificate. If this latter part applies to decrees passed pending management the decree claim can only refer to the claim made under section 29C. Otherwise in view of the length of time which litigation ordinarily takes it would be impossible for the claimant to submit his decree claim within six months of the notification. The word "unable" in section 29B would as the lower Court thinks be not very apt if it was intended to cover the impossibility of making a non-existent claim.

[1] (1907) 9 Bom L. R. 1122.

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Plaintiff preferred a second appeal, and having died pending the appeal his heir was brought on the record.

Inverarity with *M. K. Mehta* and *N. K. Mehta* for the appellant (heir-plaintiff) :—Our first point is that we were "unable" to submit our claim within six months of the notice within the meaning of section 29B (3) of the Gujarat Talukdars' Act under the circumstances of the present case, the "inability" under the section being not confined to "physical inability" only. The Talukdari Settlement Officer had, as guardian of the defendants, denied our mortgage claim and the first Court also had disallowed our claim. So at the time of the notification we could not have submitted our claim.

Secondly, we say that as the Talukdari Settlement Officer had appeared throughout the litigation as guardian of the defendants, he was kept fully informed of our claim and it was not open for him to say that he had no notice of the claim.

But if, even under the circumstances of the case, the submission was necessary, we submit that the notice issued by the appellate Court should be taken as such a submission of the claim : *Purushottam* v. *Rajbai*[1].

Further, the decree of the appellate Court allowing our claim was passed on the 14th March 1906 and a certified copy of the said decree was sent on to the Talukdari Settlement Officer by the Court on an application on his behalf on the 16th of that month, that is, within six months of the notification. That was a sufficient submission of our claim.

Lastly, we say that if our claim had been duly discharged, why should the Talukdari Settlement Officer as guardian of the defendants have filed a second appeal in the High Court against the decree of the District Court in appeal allowing our claim.

(1) (1909) 34 Bom. 142.

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G. S. Mulgavkar for respondents (defendants):—The language of the Act is quite explicit. Section 29B requires that all claims must be submitted within six months from the date of the publication of the notice.

The plaintiff had not satisfied the Court that he was unable to submit his claim within six months.

Simply because of the litigation going on between the plaintiff and defendants, it could not be said that the plaintiff was unable to submit his claim under section 29C (2). He could have produced a certified copy of the plaint in support of his claim.

SCOTT, C. J.:—In the year 1904 the plaintiff Chhaganlal Kishordas sued the respondents, who were minors represented by the Talukdari Settlement Officer as their guardian, for a decree upon a mortgage. In 1905 the Subordinate Judge granted him a personal decree only for Rs. 2,360 and costs, but the mortgage was held to be invalid under the provisions of the Gujarat Talukdars' Act. On the 27th of September 1905 the plaintiff filed an appeal. On the 21st November 1905 the Talukdari Settlement Officer took over the management of the estate under the Gujarat Talukdars' Act. On the 24th of the same month notice of the plaintiff's appeal was given to the Talukdari Settlement Officer, and on the 28th of December that Officer issued a notification under section 29B of the Gujarat Talukdars' Act calling upon claimants to submit their claims within six months of the date of the notification. On the 14th of March 1906 the District Court decided the appeal in favour of the plaintiff, holding that he had a valid mortgage upon the property of the defendants, and on the 16th of that month on the application of the office of the Talukdari Settlement Officer a copy of the District Court's decree was sent to him. Then in July after the period of six months from the date of the notification had expired,

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the Talukdari Settlement Officer, as representing the defendants, appealed against the District Court's decree. That appeal failed. The plaintiff thereafter applied under section 29E of the Gujarat Talukdars' Act to the Talukdari Settlement Officer for a certificate in order that he might proceed with the execution of the decree. He received a reply on the 12th of August 1908 that as he had not submitted his claim within six months of the date of the publication of notice under section 29B his claim was deemed to have been fully discharged, and therefore his request for the grant of a certificate would not be complied with. After one month from the date of the receipt of that reply the plaintiff has applied to the Court for execution.

The Talukdari Settlement Officer relies upon the provisions of section 29B (3) that "Every claim . . . not submitted . . in compliance with the notice . . . shall, save" in certain cases, "be deemed for all purposes and on all occasions, whether during the continuance of the management or afterwards, to have been duly discharged". That provision, however, is subject to an exception stated in the same section in these words:— "unless in any suit or proceeding instituted by the claimant, or by any person claiming under him, in respect of any such claim, it is proved to the satisfaction of the Court that he was unable to comply with the notice published under sub-section (1)."

We have now before us a proceeding in execution instituted by the claimant, and the question is whether he has proved to the satisfaction of the Court that he was unable to comply with the notice of the 28th December 1905? The learned Subordinate Judge was of opinion that the inability must be some physical inability on the part of the claimant. If that is so, it is difficult to understand why physical inability should be an excuse where a suit has been instituted and not an excuse

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where a suit has not been instituted. We are, therefore, of opinion that the word "unable" is not confined to physical inability on the part of the claimant.

Now, at the time of the notice on the 28th December 1905 what was the claimant's position? He had asserted that he was entitled to exercise the rights of a mortgagee in respect of certain property belonging to the defendants, who were represented by the Talukdari Settlement Officer, and whose property on the 21st of November passed under the management of that Officer under the Gujarat Talukdars' Act. His claim had been negatived in the Subordinate Judge's Court, but he had appealed to the District Court and that appeal did not come on for hearing until some months after the notification under section 29B. How then could he advance his real claim at the date of the notification? The first Court had held that the claim, which he contended he was entitled to put forward, was an invalid claim. But he did not accept that decision. But if he had put forward his mortgage claim before the Talukdari Settlement Officer, that Officer would have at once met him by the decree in which he had only been granted a decree for money and costs. We think, therefore, that he was unable to put forward his real claim at the date of the notification, and at the date of the notice he was unable to comply with it within the meaning of section 29B (3). The period allowed to the Talukdari Settlement Officer for appealing against the decree of the District Court enabled that Officer to keep the matter of the finality of the District Court's decree *in dubio* until after the expiration of six months from the date of the notification, and then when that period had elapsed he filed an appeal to the High Court. Under these circumstances we think that the inability of the claimant continued during that six months. We, therefore, decide the case against the Talukdari Settle-

ment Officer without taking into consideration the injustice of the contention that he has received no notice when he was actually a litigating party in the proceeding in which the claim was finally settled. If the claim had been duly discharged under section 29B (3) it is difficult to understand why the Talukdari Settlement Officer took the trouble to appeal to the High Court. The plaintiff must have his costs throughout.

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Order set aside.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

RAOJI ALIAS BALVANT KESHAV DESHAMUKH AND ANOTHER (LEGAL REPRESENTATIVES OF ORIGINAL DEFENDANT 1), APPELLANT, v. KRISHNARAO BIN ANANDRAO AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT 2).°

1914. *March 26.*

Limitation Act (IX of 1908), section 5—Appeal presented beyond time—Provisional admission to file in the absence of respondent—Preliminary objection taken by the respondent at the hearing—Entertainment of the question—Appeal dismissed with all costs—Second appeal.

A time-barred appeal having been provisionally admitted to the file in the absence of the respondent and at the hearing the respondent having taken a preliminary objection that the appeal was presented beyond time, the Court allowed the objection and dismissed the appeal with all costs on the appellant.

On further appeal by the appellant,

Held, that there being no sufficient cause as a matter of law for extending the time under section 5 of the Limitation Act (IX of 1908) there was no objection to the question being entertained after the provisional admission of the appeal to the file in the absence of the respondent.

Held, further, that the appeal against the order dismissing the appeal was a second appeal and not a first appeal because it was an appeal against the decree of an appellate Court.

° First Appeal No. 184 of 1911.

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RAOJI
v.
KRISHNA-
RAO

APPEAL against the decision of G. B. Laghate, First Class Subordinate Judge of Nasik with appellate powers, rejecting as time-barred an appeal against the decree of R. K. Bal, Subordinate Judge of Sinnar.

The plaintiffs sued to recover possession of the lands in suit and for costs and mesne profits with a declaration that none of the defendants had any right over the properties.

Defendant 1 denied his liability and contended *inter alia* that the suit was not maintainable, the lands in suit being the subject-matter of a consent decree all the terms of which had not been complied with.

Defendant 2 answered that Rs. 1,100 were still due to him on account of the mortgage of the lands in suit.

The Subordinate Judge found that Rs. 1,100 were due by defendant 1 to defendant 2 on account of the mortgage of Rs. 2,200 over the lands in suit. He, therefore, passed a decree directing that plaintiffs should take possession of the lands in suit from defendant 2 subject to the mortgage of the defendant till satisfaction, that defendant 1 should pay the mortgage lien of defendant 2 within six months and thus redeem the properties and that on redemption defendant 2 should hand over the title deeds of the property to the plaintiffs.

Defendant 1 having appealed, the appeal was found to be beyond time and it was provisionally admitted to the file. At the hearing the respondents' pleader having taken a preliminary objection that the appeal was barred by limitation it having been presented beyond time, the appellant produced an affidavit to prove that there was sufficient cause for the delay. It was alleged that the delay was due to the pleader's *karkun* who, through forgetfulness, did not apply for copies in time.

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RAOJI v. KRISHNA-RAO

The appellate Judge found that sufficient cause was not proved for the delay in presenting the appeal and he dismissed the appeal with all costs on the appellant following *Karsondas Dharamsey* v. *Bai Gungabai*[1].

Defendant 1 preferred a further appeal and he having died pending the appeal his legal representatives were brought on the record.

R. R. Desai for the appellants (legal representatives of defendant 1).

G. S. Rao for respondent 3 (defendant 2).

SCOTT, C. J. :—We cannot say that as a matter of law there was sufficient cause for extending the time under section 5, and we do not think there was any objection to the learned Judge entertaining the question after he had provisionally admitted the appeal to the file in the absence of the respondent. We are of opinion that this is a second appeal and not a first appeal, because it is an appeal from a decree of an appellate Court. We dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1905) 30 Bom. 329.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

GOOLBAI BEHRAMSHA HARVER, PLAINTIFF, *v.* BEHRAMSHA D HARVER, DEFENDANT.* 1913. *July* 4.

Parsis—Maintenance—The Parsi Marriage and Divorce Act (XV of 1865), section 31—Suit by a Parsi wife for permanent maintenance without claim for judicial separation—The High Court on its Original Side has no jurisdiction in such suit to pass an order for maintenance.

The Bombay High Court on its Original Side has no jurisdiction in a suit between a Parsi husband and a Parsi wife to make an order for permanent

* Suit No. 105 of 1913.

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alimony whether accompanied or not by any order for judicial separation. The only way in which a Parsi wife is entitled to get a decree for permanent alimony is to file a petition in the Parsi Matrimonial Court and there establish facts coming within section 31 of the Parsi Marriage and Divorce Act.

THE plaintiff, who was the wife of the defendant, filed this suit alleging in the plaint (*inter alia*) that the defendant had treated her with such cruelty as to render it impossible for her to live with him and claiming (*inter alia*) that the defendant might be decreed to make proper provision for the maintenance and residence of the plaintiff.

Wadia with *Moos*, for the plaintiff.

Kanga with *Davar*, for the defendant.

MACLEOD, J.:—The plaintiff, a Parsi married woman, has filed this suit for maintenance alleging that her husband has treated her with such cruelty as to render it improper that she should be compelled to live with him; and that, therefore, in law that amounts to desertion, or a failure on the part of the husband to fulfill the legal liability entailed upon him to maintain his wife. The question arises whether she is entitled to file a suit on the Original Side of the Court for maintenance. It appears that in England, when the Ecclesiastical Courts had exclusive jurisdiction in Matrimonial matters, those Courts only granted maintenance or alimony when the order was coupled with a decree for what was equivalent to the present decree for judicial separation. There is no record of any Ecclesiastical Court having given a decree simply for maintenance on the ground that the husband had failed to maintain his wife. The powers of the Ecclesiastical Courts were handed over to the High Court in the Probate and Divorce Division by the Matrimonial Causes Acts, and no authority has been cited to me to show that the High Court, either under or apart from the divorce jurisdiction, has jurisdiction to pass orders for main-

tenance in a suit by a wife against her husband on the ground that the husband has declined to maintain his wife. In England the Justices have now summary powers to order a husband to maintain his wife if she can prove that her husband has deserted her, and in case the Justices refuse to order maintenance there can be a reference to the High Court, which I presume would be made to the High Court in its Probate and Divorce Jurisdiction.

In the case of Parsis there is a special Act which establishes a special Court for the purpose of deciding matrimonial disputes amongst the Parsis; and though there is apparently no provision by which a Parsi wife can apply to the Parsi Matrimonial Court for an order of maintenance by itself on the ground of desertion, she can on certain grounds claim that she is entitled to demand judicial separation, and on the Court granting a decree for judicial separation, the Court can order that the husband provide her with permanent alimony.

Now, the plaintiff in this case in her plaint alleged facts which come within section 31 of the Parsi Matrimonial Act, and if she could establish those facts she would be entitled in the Parsi Matrimonial Court to a decree for judicial separation. She comes to this Court to establish those very facts on the ground that she is not bound to ask for a judicial separation, but *is entitled to get from this Court on its Original Side* an order for permanent alimony. It seems to me clear that this Court has no jurisdiction in a suit between a Parsi husband and a Parsi wife to make an order for permanent alimony unaccompanied by any order for judicial separation, which admittedly by itself this Court has no jurisdiction to grant.

There is no question about a denial of justice, because the plaintiff can file her petition in the Parsi Matri-

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monial Court and there establish the very facts which she relies upon in her present plaint. Apparently she has some objection to applying for a decree for judicial separation, but as I pointed out, as far as I can see, in the Matrimonial Courts, both in England and India, this is the only way by which a wife is entitled to get a decree for permanent alimony.

I may add that it appears that under the Parsi Matrimonial Act such questions of fact as are alleged in this case are questions which the Act specifically directs should be tried by the Parsi delegates in the Parsi Matrimonial Court, and not by the Judge.

Attorneys for the plaintiff: *Messrs. Payne & Co.*

Attorneys for the defendant: *Messrs. Ardeshir, Hormusji, Dinshaw & Co.*

H. S. C.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1914 *March 16.*

R D SETHNA, OFFICIAL ASSIGNEE AND ASSIGNEE OF THE ESTATE AND EFFECTS OF WILMOT HARRISON (APPELLANT AND DEFENDANT), v. GRACE EDITH HEMINGWAY (RESPONDENT AND PLAINTIFF).*

Indian Succession Act (X of 1865), section 190—Letters of Administration obtained by plaintiff after suit filed but before hearing and decree—Transfer of Property Act (IV of 1882), section 130—Order to banker to pay money held to the credit of customer, effect of when acted on—Stamp Act (II of 1899), section 36—Resulting trust.

One W had a deposit of Rs. 10,500 in a bank under a deposit receipt which fell due on the 7th of August 1912. W had a grand-nephew, H, to whom he wished to transfer the money, meaning that H should have the benefit of the money, but not intending that he should be able to make away with the money in W's life-time or to draw the interest without making due provision

* Appeal No 62 of 1913; Suit No. 699 of 1913.

for W's maintenance. On the 8th of August 1912 W handed to H his deposit receipt duly endorsed and a letter to the following effect :—

"I hereby state that I have found my Bank Receipt. Herewith I am forwarding the same for the interest now due I wish it to be handed over to my nephew

"I also wish you to hand over the amount of Rs 10,500 which is in fixed deposit to my nephew Wilmot Charles Harrison to his account."

H took these documents to the bank and asked for and obtained a new deposit receipt for Rs 10,000, the balance of Rs. 500 in cash and Rs. 420 in cash by way of interest On the 18th of October 1912 W died. On the 5th of August 1913 G, a grand-niece of W, filed a suit against H as administratrix of the estate of W, claiming that the sum deposited with the Bank, in the plaint stated to be Rs 10,000 formed part of the estate of W and that the plaintiff, as administratrix of his estate, was entitled to the same At the date of the filing of the suit G had not obtained Letters of Administration to W's estate but did obtain them before the hearing of the suit.

Held, that the plaint was defective in that it did not show that the plaintiff had obtained Letters of Administration, and should on that account have been rejected on presentation, but that as the plaintiff had obtained Letters of Administration before the hearing and the hearing had been allowed to proceed, a decree passed in favour of the plaintiff was not contrary to section 190 of the Indian Succession Act.

Held further, that where money mentioned in a deposit receipt was immediately payable and the receipt was presented duly endorsed together with an order to pay a given individual that individual became the owner of the money upon payment by the banker or upon his promise to hold the money at the disposal of the payee, that an order on a banker to pay money which he held to the credit of a customer was not an assignment of a debt, but an authority to deliver property, which, if acted on, was equivalent to delivery by the customer, and that the letter of the 8th of August 1912 was such an order and had been acted on and though had an objection been taken at the hearing before the lower Court it might have been rejected for want of a stamp that such an objection could not be taken on appeal, the letter being on record

Held further, that the intention of the donor, W, to benefit negatived the idea of any resulting trust in his favour.

ONE Charles Andrew Wakeford was a Government pensioner and a resident of Bombay. He had several relatives, including ten grand-nephews and grand-nieces, amongst these being the plaintiff to the present suit

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and one Harrison the original defendant. In addition to his pension Mr. Wakeford had the sum of Rs. 10,000 deposited with the Hongkong and Shanghai Bank. About the end of the year 1910 Mr. Wakeford seems to have made a will by which he left the said sum to certain relatives and others, the plaintiff and Harrison receiving shares.

Subsequently to making this will, in the year 1912, Mr. Wakeford, who was over 80 years of age, desired that his grand-nephew, Harrison, should look after him. About this time some coolness seems to have sprung up between the plaintiff and Mr. Wakeford. Harrison and his wife accordingly visited Mr. Wakeford at his house continuously from the 11th of July 1912 till the 15th of September 1912 when Mr. Wakeford went to live at Harrison's house and remained there, attended to by Harrison and his wife, until his death on the 18th of October 1912.

Shortly after Harrison and his wife began to visit Mr. Wakeford the latter formed the resolution to cancel his will and to make over the moneys deposited with the Hongkong and Shanghai Bank to Harrison subject to some such condition as that the latter should look after him while he lasted.

In July 1912 Mr. Wakeford had in fact mislaid the deposit receipt and on the 24th of July 1912 he went to the Bank with Harrison to inquire what formalities should be followed in order to enable him to recover the moneys deposited. He was given a form of indemnity which he took away with him. On the same day after his return from the Bank it seems that Mr. Wakeford in the presence of Harrison and of another witness tore up his will saying that it would not be required as he had transferred his money to Harrison. On the 4th of August 1912 the missing

deposit receipt was discovered. On the 7th of August Mr. Wakeford signed his name on the back of the deposit receipt and gave it to Harrison with a letter addressed to the Bank directing them to transfer the amount to Harrison. The latter took these two documents to the Bank but was informed that as he had not been identified by Mr. Wakeford the amount could not be dealt with. Harrison returned to Mr. Wakeford's house and at the latter's dictation wrote out the following letter, which was subsequently signed by Mr. Wakeford who also at the foot of the letter identified Harrison's signature :—

Bombay, 8th August 1912.

The Agent
Hongkong and Shanghai Banking Corporation

Sir

I hereby state that I have found my Bank Receipt Herewith I am forwarding the same for the interest now due I wish it to be handed over to my nephew.

I also wish you to hand over the amount of Rs 10,500 which is in fixed deposit to my nephew Wilmot Charles Harrison to his account.

Yours truly,
(Signed) C. A. Wakeford.

This is my nephew's signature .—

(Signed) W C. Harrison
(Signed) C A Wakeford.

On the 8th of August 1912 Harrison went again to the Bank and handed in the deposit receipt and the last mentioned letter and received from the Bank Rs. 420, as interest due on the deposit, and Rs. 500 out of the principal sum deposited and a deposit receipt for Rs. 10,000 in his own name.

After the death of Mr. Wakeford on the 18th of October 1912 the plaintiff for the first time heard of the destruction of his will and of the transfer of the

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money deposited at the Bank into the name of Harrison. The plaintiff disputed the right of Harrison to the money and finally on the 5th of August 1913 filed the present suit against Harrison claiming the money as the administratrix of the estate of Mr. Wakeford. At that date the plaintiff had not obtained Letters of Administration but these were obtained by her on the 31st of October 1913.

On the 13th of November 1913 the case came on for hearing before Mr. Justice Macleod, who on the 17th of November gave judgment in favour of the plaintiff. The material portions of the learned Judge's judgment are the following :—

Now, on the 8th of August what was due to the deceased from the Bank was a debt of Rs 10,500, that clearly under section 3 of the Transfer of Property Act was an actionable claim and the only way in which that could be transferred by the owner to another person was by a writing according to the terms of section 130. It is contended that Exhibit 3 satisfies the provisions of section 130 but it is quite clear that it does not. This writing is merely a notice to the person from whom the debt was due, asking him to hand over the amount of the debt to the defendant, but that is not sufficient to transfer the ownership in the debt. An obvious test is to see whether after this document had been executed the defendant could have sued the Bank on it When a writing under section 130 has been executed, all the rights and remedies of the transferor vest in the transferee But the mere direction by the owner of a debt to the debtor to transfer in his books the debt in the name of another party cannot give that other party any right to sue for the debt This letter is merely a notice of transfer which after the transfer has been made the transferee can call upon the transferor to make under section 131. That is really sufficient to dispose of the case, as there was no transfer as required by law of the debt due by the Bank to the deceased, and, therefore, it remained up to the time of his death an asset belonging to him; but I had better deal with the other issues raised in the case, as this point was only taken by the plaintiff's counsel at a late stage in the case..............................I am satisfied on the evidence that the deceased was anxious that the defendant should have the benefit of this money deposited with the Hongkong Bank...... ....What I think the evidence points to is this, that the deceased did not want to have the bother of having to sign documents and having to go to the Bank to recover interest, and he also did not want there to be any trouble after his death with regard to a will, but he wished that after his death

the defendant should have the benefit of this money and that the defendant might be able to draw it without any further trouble. This could be effected by having the deposit receipt in the name of the defendant I do not think that he intended that the defendant should be able to make away with the money during his life-time or that the defendant should be able to draw the interest without making due provision for his maintenance All the evidence and all the surrounding circumstances of the case are perfectly in consonance with this finding

Therefore, section 80 of the Trusts Act will apply The defendant must be considered as holding the deposit receipt for the benefit of the legal representatives of the deceased It has been argued further for the plaintiff that even if there was the intention to transfer the beneficial interest in this debt due by the Bank to the defendant, yet a Court of Equity would set it aside if it was satisfied that the donor was not fully aware of what he was doing The case of *Anderson* v *Elsworth*[1] has been cited in support of that proposition However I hardly think that the facts of the case are similar to the facts in this case There is a considerable difference between a long legal document which a layman would find it difficult to understand without the effect being explained to him by a lawyer, and the gift of a sum of money If the deceased had in his mind the giving away of these Rs 10,500 and acted in such a manner as to make a gift an immediate gift of that sum it would be difficult to say that he did not know what he was doing or imagine circumstances from which the Court could hold that he did not know what he was doing...........

A point was raised that the plaintiff is not entitled to a decree because at the time the suit was filed she had not obtained Letters of Administration to the estate of the deceased Section 190 of the Succession Act says "No right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless Letters of Administration have first been granted by a Court of competent jurisdiction" Decisions under section 187 to the effect that the Court can give relief so long as probate has been granted before the decree apply also to section 190, therefore the plaintiff having obtained Letters of Administration is entitled to a decree

Harrison appealed. He subsequently became insolvent and the Official Assignee was made a party to the appeal in his place.

Binning, with him *Shortt*, for the appellant :—

The plaintiff sued as the administratrix of Wakeford; at the time the suit was filed the grant was not issued.

(1) (1861) 3 Giff. 154

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[The Court considers that there is nothing in the point now.]

This was a novation; no writing was necessary under section 130 of the Transfer of Property Act.

If it was an assignment, the moneys were transferred. Contends that the letter of the 8th of August 1912 was a sufficient compliance with section 130; also the deposit receipt of the 8th of August 1912.

[The Court asks whether any stamp duty was required for the document; it could not be admitted as a cheque.]

The letter did not amount to a bill of exchange or cheque.

Submits that the learned Judge has found that Wakeford intended that Harrison should have the money after his death.

(To Court) Submits that there was no necessity to draw a cheque but to produce the receipt. Anyone who produced the receipt would get the money.

Refers to section 81, illustration (c) of the Trusts Act. Section 81 was entirely different from the facts of this case.

Admits that there was a trust not to touch the principal as long as the deceased was alive.

For a contract between Wakeford and the Bank there was substituted a contract between Harrison and Wakeford.

Refers to section 62 of the Contract Act.

The Bank has paid to Harrison and could not perform the contract made with Wakeford; refers to *Harding* v. *Harding*[1].

[1] (1886) 17 Q. B. D. 44.

There was complete proof of novation without the letter.

Inverarity, with *Strangman* (Advocate General), for the respondent :—

Contends that if A's money stands in B's name, B has to show how the money came to stand in his name under section 130. The defendant must show a beneficial interest in the money.

The letter was a direction to the Bank to renew the deposit in the name of Harrison. It was not a transfer certainly not an assignment. The assignment contemplated in section 130 should be in writing.

The defendant has failed to prove a gift.

That document (the letter of the 8th of August 1912) was a bill of exchange and therefore inadmissible in evidence. Refers to *Edwards* v. *Jones*[1]; *Down* v. *Ellis*[2].

Binning, in reply, refers to sections 36 and 61 of the Stamp Act; *Harding* v. *Harding*[3]; section 81 of the Trusts Act; section 123 of the Transfer of Property Act.

The plaintiff was not looking after the deceased, his client was looking after him. It is a perfectly clear case of payment by the deceased's agent to a party nominated by him. Refers to Ashburner's Equity, page 143.

Inverarity refers to *Mulraj Khatau* v *Vishwanath Prabhuram Vaidya*[4].

Contends that in India there cannot be an equitable transfer by deposit of an actionable claim. There was no equity until the instrument had been executed.

C. A. V.

(1) (1836) 1 My. & Cr. 226

(2) (1865) 35 Beav. 578.

(3) (1886) 17 Q B D 442.

(4) (1912) L. R. 40 I. A. 24

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SCOTT, C. J. :—The undisputed facts are that one Mr. Wakeford, who was in receipt of a Government pension of Rs. 54 per mensem, had a deposit of Rs. 10,500 with the Hongkong and Shanghai Bank under a deposit receipt of the 7th of August 1911 which fell due on the 7th August 1912. On the 26th June 1912 he wrote to the Bank saying the receipt had been stolen and asking for a duplicate receipt. He visited the Bank soon after and was given a form for an indemnity to the Bank on the issue of a fresh receipt. He then told the Bank clerk Sunderrao that he wanted a duplicate and wanted to give the money to his nephew, the defendant Harrison, who had accompanied him to the Bank. The defendant came to the Bank again on the 7th August with the deposit receipt, which had been found duly endorsed and a letter from Wakeford but upon being told he would have to be identified by Wakeford took away the deposit receipt and the letter. He returned the following day with the deposit receipt bearing Wakeford's endorsement, dated the 7th August, and also with a letter in the following terms :—

Bombay, 8th August 1912

The Agent,

Hongkong and Shanghai Banking Corporation.

Sir,

I hereby state that I have found my Bank Receipt. Herewith I am forwarding the same for the interest now due. I wish it to be handed over to my nephew

I also wish you to hand over the amount of Rs 10,500 which is in fixed deposit to my nephew Wilmot Charles Harrison to his account.

Yours truly,
(Signed) C. A Wakeford

This is my nephew's signature :—

(Signed) W. C. Harrison
(Signed) C. A. Wakeford

The defendant asked for a new deposit receipt for Rs. 10,000 and the Bank issued a receipt for that sum in the defendant's name and paid him the interest due on the former receipt and Rs. 500 as the balance of the principal.

Wakeford died on the 18th October 1912 at the age of 84 unmarried and leaving him surviving as his next of kin ten grand-nephews and nieces, *viz.*, two sons and two daughters of his predeceased niece Jane Williams and three sons and three daughters of his predeceased nephew Edmund Harrison. Two days before the due date for payment by the Bank of the sum of Rs. 10,000, secured by the deposit receipt in favour of the defendant, one of the daughters of Jane Williams filed this suit claiming a declaration that she as administratrix of Wakeford was entitled to the said sum of Rs. 10,000 as part of his estate.

The plaint was defective in that it did not show that the plaintiff had obtained Letters of Administration and it should on that account have been rejected on presentation. The plaintiff, however, obtained Letters of Administration on the 31st October 1913 a fortnight before the hearing and the hearing was allowed to proceed. A decree was passed for the plaintiff declaring that the Rs. 10,000 in question formed part of the estate of the deceased and that the plaintiff was entitled to the same. This was not contrary to section 190 of the Succession Act as remarked by the learned Judge. The only tenable technical objection was to the institution of the suit before the plaintiff had an existing interest in the subject-matter. That point, however, if it had been taken and had resulted in the rejection of the suit at the hearing, would have only led to a waste of time and costs without benefitting the defendant, for a fresh suit would immediately have been brought by the administratrix. The course which the trial

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eventually took was determined by a ruling of the learned Judge that the endorsement of the receipt by the deceased was not evidence of a gift and that the onus was on the defendant to show how what was the only property of the deceased in August came to be given to him and that if he proved facts from which the Court could deduce that there was a good gift the plaintiff would then have to prove circumstances showing the gift was invalid. On the evidence the learned Judge was satisfied that the deceased was anxious that the defendant should have the benefit of the money deposited with the Bank but did not think that he intended that the defendant should be able to make away with the money in the donor's life-time or draw the interest without making due provision for the donor's maintenance but he held that there was no effective transfer, having regard to section 130 of the Transfer of Property Act, of the debt due by the Bank to the deceased and that, if there was, there would be a resulting trust for the legal representative of the deceased under section 81 of the Indian Trusts Act.

We are unable to concur in the learned Judge's conclusion as to the effect of the transaction of the 8th of August. It is established by a preponderance of English authority that a deposit receipt is not a negotiable instrument which passes either by delivery or by endorsement, but where the money mentioned in the receipt is immediately payable and the receipt is presented duly indorsed together with an order to pay a given individual that individual becomes the owner of the money upon payment by the Banker or his promise to hold it at the disposal of the payee. The question is discussed by Buckley, J., in *In re Beaumont*(1) where he says:—"In all the cases, in order that the gift may be valid, it must I think be shewn that the

(1) [1902] 1 Ch. 889 at p. 894

donor handed over either property, or the indicia of title to property, which belonged to him. His own cheque is not property; it is only a revocable order such that if the banker acts on it the donee will have the money to which it relates. Even without actual payment of the cheque there may be a good gift—for instance, if there is an undertaking by the banker to the donee to hold the amount of the cheque for the latter, that may be enough. Unless there is that, or something equivalent to it, there is no delivery of property, but only a delivery of that which if acted on will procure the delivery of property". An order on a Banker to pay money which he holds to the credit of the customer is not an assignment of a debt but an authority to deliver property which if acted on is equivalent to delivery by the customer. Here the letter of the 8th of August is such an order and it has been acted on. It may be that if objection had been taken at the hearing it would have been rejected for want of a stamp. That, however, is not an objection which can be effective in appeal now that the letter is in the record (see section 36 of the Stamp Act).

The defendant is, therefore, the owner of the money secured by the existing receipt and the plaintiff cannot succeed unless she shows that he holds it in trust for the donor or his representatives. In our opinion the finding of the learned Judge as to the intention of the donor, which is as favourable to the plaintiff as the evidence permits, negatives the idea of any resulting trust. Upon that finding this is a much stronger case in favour of the donee than *Standing* v. *Bowring*[1]. The plaintiff in that case being 86 years of age and being possessed of Consols to the amount of £6,000 transferred them into the names of herself and her godson. It was proved that she was aware when she did this that she would

[1] (1885) 31 Ch. D. 282.

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be able during her life-time to receive the dividends and that if her godson survived her he would become entitled as survivor. Lindley, L. J., remarked at page 289:—"The plaintiff in her statement of claim and in the Court below rested her case on equitable grounds, and sought to establish a trust in her favour. But the only trust which was consistent with the evidence was a trust to pay her the income of the Consols for the joint lives of herself and the defendant. This trust was not in controversy, but is not sufficient for the plaintiff's purpose. No trust will suffice short of an absolute trust for herself. But it is impossible to impose such a trust on the defendant, when the evidence conclusively shews that she never intended to create any trust of the kind. Trusts are neither created nor implied by law to defeat the intentions of donors or settlors: they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied".

The gift in this case was an absolute gift to the donee with the expectation that he would look after the donor till the latter's death. In our opinion the evidence shows, though this is not essential to the defendant's success, that the defendant acted up to the donor's expectations. According to Exhibit 10 (a letter of the deceased to the plaintiff in June 1911) the donor paid his rent out of the interest he then received from the Bank and presumably paid his other expenses from his monthly pension of Rs. 54. In the month following the gift the defendant took the donor to live with him and thus became responsible for his lodging.

The learned Judge at one period of the case thought that the fact that an old man of debilitated health gave all his savings to the one among his nephews and nieces who had taken charge of him raised a presumption of undue influence. We are not prepared to assent

to this, and the evidence shows in addition that a coolness had arisen between the old man and the plaintiff whom along with her sister he had at one time intended to benefit by will. In our opinion the evidence establishes that the donor was perfectly sensible and competent at the time of the gift and the charge that the defendant exercised undue influence fails. We reverse the decree of the lower Court and dismiss the suit with costs throughout.

Attorneys for the appellants: *Messrs. Little & Co.*

Attorneys for the respondents: *Messrs. Pestonji, Rustomji and Kolah.*

H. S. C.

APPELLATE CIVIL.

Before Sir Basil Scott Kt, Chief Justice, and Mr Justice Batchelor.

THE SHOP STYLED TAYABALLI GULAM HUSEIN (ORIGINAL DEFENDANTS), APPELLANTS, v. ATMARAM SAKHARAM (ORIGINAL PLAINTIFF), RESPONDENT.* 1914. *March* 24.

Civil Procedure Code (Act XIV of 1882), sections 268, 278, 283—Civil Procedure Code (Act V of 1908), Order XXI, Rules 58 and 63—Transfer of Property Act (IV of 1882), section 132, illustration (i)—Decree—Execution—Garnishee—Attachment of debt—Objections by Garnishee unsuccessful—Purchase by judgment creditor—Suit by purchaser against Garnishee—Garnishee cannot raise the same defence—Suit by Garnishee, period of one year from the date of adverse order—Equity of cross debt—setting up without payment of Court fee—Garnishee's right of set-off—Prompt decision—Garnishee, trustee for the judgment-debtor

A brought a suit against B and in execution of the decree attached a debt alleged to be due to B by T under section 268 of the Civil Procedure Code (Act XIV of 1882). T's objection to the attachment having failed A applied for the sale of the debt and having purchased it himself at the Court sale brought a suit against T, the Garnishee, for the recovery of the debt. Garnishee having set up the same facts in defence as he had set up when he unsuccessfully objected to the attachment,

* Second Appeal No 509 of 1913.

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Held, that the equity arising from the cross debt could be set up by the defendant without payment of Court fee as on a counter claim, that if a cross debt were due to a Garnishee, there should be a right of set-off in his favour.

Held, however, that it was not open to the Garnishee to plead a defence which had already, in an execution inquiry, been unsuccessful, except in a suit instituted within one year from the date of the adverse order, that the property attached could be regarded as property in the possession of the Garnishee in trust for the judgment-debtor, and, therefore, could be attached.

Held, further, that a Garnishee's claims and objections should be decided as promptly as other objections to the attachment

Chidambara Patter v *Ramasamy Patter*(1), followed.

Mussamut Rambutty Kooer v. *Kamessur Pershad*(2), not followed.

SECOND appeal against the decree of J. Scotson, Assistant Judge of Khandesh, dismissing an appeal against the decree of V. G. Sane, Subordinate Judge of Chalisgaon.

The facts were as follows :—

One Baba Ismail Bohori owned two shops, one at Pachora and the other at Chalisgaon. He had dealings with a firm known as Tayaballi Gulam Husein. The proprietors of the firm were Rasoolbhai Tayaballi and his brother Khurbanalli Tayaballi. The firm had a stationery shop at Pachora and a Ginning factory at Saygaum. In the firm's books at Pachora there was a sum of Rs. 650 to the debit of the said Baba Ismail and in the books at Saygaum there were to his credit Rs. 591. The plaintiff Atmaram Sakharam obtained a decree, No. 689 of 1904, against his debtor the said Baba Ismail and in execution under a darkhast, No. 1533 of 1904, he attached by a prohibitory order Rs. 1,023-3 alleged to be due by the said firm to the judgment-debtor Baba Ismail and the firm was ordered to produce into Court the amount of the alleged debt. The firm, however, disputed its liability and objected to the attachment on the ground that no debt was due by

(1) (1903) 27 Mad. 67.

(2) (1874) 22 W. R. 36.

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it to Baba Ismail. The Court overruled the firm's objection and on the plaintiff's application ordered that the debt of Rs. 594 due by the firm to Baba Ismail should be sold and it was purchased by the plaintiff for Rs. 55 at an auction sale on the 7th June 1906. The plaintiff made a demand on the firm for the payment of the debt and the demand not being complied with, he, on the 14th February 1908, brought the present suit against the firm represented by its two aforesaid proprietors for the recovery of Rs. 594 with interest at 9 per cent. from date of suit.

Defendant 1, Rasoolbhai Tayaballi, raised the defence of set-off which he had unsuccessfully pleaded in the execution proceeding, and further contended that the firm was not indebted in Rs. 1,023-8 to Baba Ismail, but the latter was, on the contrary, indebted to the firm to the extent of Rs. 56-12-6, that the plaintiff got nothing by his purchase, that the firm had kept separate books at their shops at Pachora and Saygaum, that the plaintiff had not disclosed with details the items by which Baba Ismail became the creditor of the firm to the extent of Rs. 1,023-8, that the suit was time-barred and that the plaintiff was not entitled to future interest.

Defendant 2, Khurbanalli Tayaballi, was absent.

The Subordinate Judge found that as the Court-purchase by the plaintiff took place on the 7th June 1906 and the suit was filed on the 14th February 1908, the claim was time-barred. He, therefore, dismissed the suit.

On appeal by the plaintiff the Subordinate Judge's decree was reversed and the case was sent back for trial on the merits.

On the remand the Subordinate Judge found that the defendant was not entitled to claim a set-off inasmuch as he had elected not to pay the Court fee necessary for

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the set-off. He, however, passed a decree for the plaintiff for Rs. 594 on the admission of the defence "that Rs. 594 are to the credit of Baba Ismail in their Saygaum account and the right to recover the same being attached by the plaintiff, he is entitled to recover the same".

With respect to the set-off the Subordinate Judge observed :—

° ° ° If the defendants want to set off the amount to their credit in the Saygaum books against the claim in suit, their prayer for the same cannot be given effect to unless they first pay the necessary Court fees. Set-off is in the nature of a counter claim and the institution fees have to be first paid. *I therefore find* ° ° *that the defendants are liable to pay the* Court fees.

On appeal by the defendants the Assistant Judge confirmed the decree on the following among other grounds :—

Dealing first with the question of set-off. It was urged in the lower Court that the Rs 1,000 credited in the Saygaum shop books were for payment made by Baba Ismail towards his debit at the Pachora shop. The lower Court has considered this point and decided on grounds which seem good to me, that such was not the case The position then is that Baba Ismail had two separate accounts at Saygaum and Pachora ; in the former he was at credit and the latter at debit *The plaintiff in this case purchased the debt due to Baba Ismail*, that is to say, the credit to Baba Ismail at the Saygaum shop, and sues the present defendants for what was owing to Baba Ismail on that Khata. He stands in Baba Ismail's shoes as far as that claim is concerned He is in no way responsible however for Baba Ismail's debts and the defendants are not entitled to claim from him for Baba's indebtedness to them.

Defendants say however that for the whole they were not indebted to Baba Ismail and therefore plaintiff got nothing by his purchase. I cannot agree with this. There was no reason whatever why, the accounts being separate (as they have been held to be), Baba should not have sold his credit on one Khata even although he were indebted on another and similarly that credit should be attached and sold

This being so, defendants cannot possibly claim that the other Khata should be taken into account, for the plaintiff has not made himself responsible for Baba's debts—he has only purchased one of his assets.

There can therefore be no question either of set-off or reduction of plaintiff's claim by the amount due to the Pachora shop.

The defendants preferred a second appeal.

Shortt with *M. V. Bhat* for the appellants (defendants).

Weldon with *R. R. Desai* for the respondent (plaintiff).

SCOTT, C. J. :—In execution of a decree in Suit 689 of 1904 against Baba Ismail, a debt of Rs. 1,023, alleged to be due to the judgment-debtor by the firm of Tayaballi Gulam Husein, the present defendants, was attached by the judgment-creditor, the present plaintiff, under section 268 of the Code of 1882. The Garnishees received notice to bring into Court the amount of the alleged debt, but as they disputed their liability they objected to the attachment and the judgment-creditor having put in an answer they gave evidence before the executing Court to prove that they in fact owed nothing to the judgment-debtor as although Rs. 594 were due by them to the judgment-debtor's Chalisgaon shop, Rs. 676 was due to them by the judgment-debtor's Pachora shop. This evidence was given on the 4th of September 1905 and thereafter on the same day the plaintiff applied for sale of the debt of Rs. 594. The executing Court then ordered that this debt should be sold. On the sale it was purchased by the plaintiff who now brings this suit to recover the Rs. 594 from the Garnishees.

The Garnishees set up the same facts in defence as they set up when they unsuccessfully objected to the attachment. The learned Judge in the lower appellate Court was of opinion that the Chalisgaon and the Pachora accounts being separate the defendant could not claim that the Pachora debt should be taken into account, for the judgment-creditor had not made himself

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responsible for the judgment-debtor's debts having only purchased one of his assets. If this were the only question in the case we should reverse the decree of the Assistant Judge, for, as decided in *Tapp* v. *Jones*[1], if a cross debt were due to the Garnishee at the date of the attachment it is obviously just that there should be a right of set-off in his favour: this principle is recognised by the Indian Legislature in the Transfer of Property Act, section 132 (see illustration (*i*)). We also do not agree with the Subordinate Judge in the trial Court that the equity arising from the cross debt could not be set up by the defendants except on payment of a Court fee as on a counter-claim.

The more serious question for the defendants is, we think, whether the defence of set-off is open to them after their failure to raise the attachment as no suit has been filed by them within a year from the 4th of September 1905 to establish the right alleged by them and not allowed by the executing Court.

The point was not taken by the plaintiff in the lower Court and was just suggested from the Bench in this appeal. We have now heard arguments upon the point.

The defendants' Counsel relies upon the decision in *Mussamut Rambutty Kooer* v. *Kamessur Pershad*[2] which upon the facts found was a similar case to the present. We are, however, unable to accept it as an authority for two reasons. First, because section 216 of the Code of 1859 provided that the party against whom an order might be given on investigation might bring a suit to establish his right within one year from the date of the order: a provision which the Court held would not necessarily prevent the Garnishee from setting up the same defence upon an action brought against him by the purchaser of the debt. This ruling is no longer

(1) (1875) L. R. 10 Q B. 591 at p. 593 (2) (1874) 22 W. R. 36.

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applicable, for section 283 of the Code of 1882 (Order XXI, Rule 63 of the present Code) provides that the order on the investigation shall, subject to the result of such suit, if any, be conclusive. It is, therefore, no longer open to a Garnishee to plead a defence which has already in an execution inquiry been unsuccessful except in a suit instituted within one year from the date of the adverse order. Secondly, we are unable to follow the argument of the Calcutta Judges based upon other sections of the Act of 1859 for it seems to ignore the finding arrived at that the property attached was not money but a debt, and the provisions of section 265 which provided for the delivery of debts *sold* in execution.

The other case relied on by the appellants was *Harilal Amthabhai* v. *Abhesang Meru*[1] in which on an unargued reference for opinion from a Subordinate Court the Judges expressed the opinion that section 278 of the Code did not apply to objections to the attachment of debts but that the Court should satisfy itself that a debt was existent before selling it. This decision does not appear to us wholly consistent with that in *Mansukh* v. *Bhagwandas* mentioned in the Subordinate Judge's reference in *Harilal Amthabhai* v. *Abhesang Meru*[1]. We cannot accept an expression of opinion on an unargued reference as a binding authority. A different view of section 278 has been taken by a Full Bench of the Madras High Court after argument in *Chidambara Patter* v. *Ramasamy Patter*[2] overruling *Basavayya* v. *Syed Abbas Saheb*[3], a decision based upon *Mussamut Rambutty Kooer* v. *Kamessur Pershad*[4]. We agree with the Full Bench of the Madras High Court. It is of importance that Garnishee's claims and objections should be decided at least as promptly as other objections to attachment.

(1) (1880) 4 Bom. 323.
(2) (1903) 27 Mad. 67.
(3) (1900) 24 Mad. 20.
(4) (1874) 22 W. R. 36.

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Order XXI, Rule 58 applies in terms to any property attached in execution and thus relates to debts so attached. The sum of Rs. 594 appearing due, in one set of the Garnishees' books, to the judgment-debtor was not liable to attachment if it was in fact cancelled by another debt due by the judgment-debtor to the Garnishee in another set of books. If it was not so cancelled it was attachable property constructively in the possession of the judgment-debtor. In another view also the question raised by the Garnishee called for investigation under section 278 and the following sections, for the debt attached could be regarded as property in the possession of the Garnishee in trust for the judgment-debtor, see *Vinall* v. *De Pass*(1) per Lord Halsbury. We dismiss the appeal without costs.

Appeal dismissed.

G. B. R.

(1) [1892] A. C. 90 at p. 95.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1914. *March 26.*

SHAH VELCHAND CHHAGANLAL, PLAINTIFF, v. LIEUTENANT R. C. C. LISTON, DEFENDANT.*

Civil Procedure Code (Act V of 1908), sections 115 and 151—Money-lender and debtor—Arbitrator's award—Decree without inquiry into the nature of the award—Manual of High Courts' Circulars, Chapter VI, para 2—Inquiry —Real point of difference—Decree set aside—Abuse of judicial process.

The plaintiff, a money-lender, filed in Court an arbitrator's award passed against the defendant debtor and prayed for a decree in the terms of the award The Court having presumed that there was a real point of difference between the parties passed a decree in the terms of the award without instituting inquiry

* Application No. 271 of 1913 under extraordinary jurisdiction.

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directed by a circular of the High Court (Manual of High Courts' Circulars, Chapter VI, para 2, page 181[1])

Held setting aside the decree under sections 115 and 151 of the Civil Procedure Code (Act V of 1908), that there was an abuse of judicial process.

APPLICATION under the extraordinary jurisdiction in the form of a letter, dated the 6th November 1913, from E. Clements, District Judge of Ahmedabad, requesting the Court under section 115 and Schedule II, Rule 21 of the Civil Procedure Code (Act V of 1908) to take action against the decree of H. A. Mohile, Additional First Class Subordinate Judge of Ahmedabad.

The plaintiff, a money-lender of Baroda, had monetary dealings with the defendant, a Lieutenant in a British Regiment. In the month of July 1913 the plaintiff's agent saw the defendant at Aurangabad and took from im a promissory note, dated the 9th July 1913, for Rs. 4,931 which sum was made up of past advances and interest. The promissory note was made payable in Ahmedabad or Baroda. On the 11th July 1913 the plaintiff's agent obtained two other documents from the defendant, one in the form of a reference to arbitration whereby the plaintiff and the defendant agreed to refer

(1) Manual of High Courts' Circulars, Chapter VI, para. 2, page 181 is as follows :—

2. In some parts of the Presidency, certain classes of money-lenders are in the habit of lending money to impecunious Military and Civil officers and to poor agriculturists, not on bonds or promissory notes but on arbitration awards, and the loan, the amount of which is usually much less than the amount stated as advanced in and payable by the award, is not advanced until after these arbitration awards are actually filed in Civil Courts and decrees passed thereon The object of this procedure is apparently to oust the jurisdiction of the Civil Courts and prevent them from inquiring into the terms of the transaction. It has been found that some Judges have been in the habit of ordering these so-called arbitration awards to be filed and passing decrees thereon without enquiring into their nature Their Lordships therefore desire to impress upon the Judges that it is the duty of every Judge, before he allows arbitration awards to be filed in Court, to satisfy himself that there has been some point of real difference which was submitted to arbitration and that there was an arbitration on that point of real difference.

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the dealings between them to Bhailal Nandlal, a pleader of Ahmedabad, and requested him to settle the accounts and to pass an award in favour of the plaintiff on the strength of the said promissory note. The other document was a Vakilpatra by the defendant appointing Velchand Umedchand of Ahmedabad as his pleader authorizing him to appear in the Court of the First Class Subordinate Judge of Ahmedabad and to admit the award which might be passed against him by the said Bhailal Nandlal. Both the said documents were in printed forms. On the 16th July 1913 the plaintiff's agent filed a suit against the defendant in the Court of the Additional First Class Subordinate Judge of Ahmedabad stating in the plaint that in order to settle the dispute between the parties with respect to the promissory note of the 9th July 1913, the parties referred the dispute to the arbitration of Bhailal Nandlal on the 11th July 1913 and the arbitrator made his award on the 16th July 1913 directing the defendant to pay to the plaintiff at Ahmedabad Rs. 4,931 by instalments of Rs. 75 each and Rs. 30 for pleader's fees. The plaint prayed for a decree in the terms of the award. On the 21st July 1913 the plaintiff's agent made an affidavit stating that the defendant had no means to pay off the debt. The Subordinate Judge, on the 22nd July 1913, ordered that the award "be filed and decree be drawn up in the terms thereof". He delivered the following judgment :—

Defendant appears by Mr Velchand and was willing to abide by the terms of the award (Exhibit 5). Exhibit 8 is the award passed by pleader Mr. Bhailal. There appears to be a real point of difference between the plaintiff and the defendant, *viz.*, the amount due by the latter to the former and the amount of instalments which the defendant should pay to the plaintiff. The award therefore fulfils the conditions laid down in para. 2 of clause VI of the New High Court Circulars, page 181, and it deserves to be filed.

The said proceedings having been brought to the notice of the Court by the District Judge of Ahmedabad as aforesaid, the Court moved in the matter under sec-

tions 115 and 151 of the Civil Procedure Code (Act V of 1908).

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There was no appearance for the parties.

SCOTT, C. J.:—In this case the Subordinate Judge Mr Mohile has disregarded a circular of this Court and allowed a most transparent abuse of judicial process. A money-lender obtains from an Officer at Aurangabad a promissory note for Rs. 4,931, payable in Ahmedabad or in Baroda, with interest, dated the 9th of July 1913, and under date the 11th of July two other documents are obtained from the Officer, one in the form of a reference to arbitration whereby the Officer and the money-lender agree to refer the matter of money-dealings between them to Bhailal Nandlal, pleader of Ahmedabad, and nominate him arbitrator to settle the accounts and pass a judgment against the Officer in favour of the money-lender on the strength of the promissory note of the 9th of July. The other document is a Vakilpatra by the Officer appointing Velchand Umedchand of Ahmedabad as his pleader to authorize him to appear in the Court of the First Class Subordinate Judge of Ahmedabad and admit the award that may be passed against him by Bhailal Nandlal in the matter of money transactions between himself and Velchand Chhaganlal. Both the last-mentioned documents are on printed forms supplied presumably by the money-lender. Then a plaint is filed on the 16th of July by the money-lender's Mukhtyar stating that in order to settle the dispute relating to the promissory note of the 9th of July the parties appointed the pleader as Panch on the 11th, who decided the matter and made his award on the 16th directing that the defendant should pay the plaintiff at Ahmedabad Rs. 4,931 in cash by instalments, and Rs. 30 for pleader's fee; and the plaint prayed for a decree in terms of the award. Then there is an affidavit of the agent of the money-lender, dated the 21st of July, stating that as the defendant has at

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present no means to pay off the debt, we appointed a Panch, and the Panch fixed instalments as mentioned above.

Mr. Mohile, the Subordinate Judge, on the 22nd of July entertained the application to pass a decree in accordance with the so-called award. He says:—

There appears to be a real point of difference between the plaintiff and the defendant, that the amount due by the latter to the former and the amount of instalments which the defendant should pay to the plaintiff.

It was quite clear upon the proceedings that there was no point of difference between the parties and no dispute as to the amount of instalments which should be paid. We regret that the First Class Subordinate Judge should have allowed his Court to be used for a proceeding of this kind, and it reflects but little credit on his judicial capacity that he should have permitted it. We set aside the decree under sections 115 and 151 of the Code of Civil Procedure.

Decree set aside.

G. B. R.

CRIMINAL REVISION.

FULL BENCH.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Batchelor and Mr. Justice Beaman.

1914 *March 31*

In re PUNAMCHAND MANEKLAL.*

Criminal Procedure Code (Act V of 1898), section 195, clauses (b) and (c)—Income-Tax Collector—Revenue Court—Sanction to prosecute—Indian Penal Code (Act XLV of 1860), sections 193, 196, 209, 471—Offences committed before the Income-Tax Collector.

An Income-Tax Collector is a Revenue Court within the meaning of that term as used in clauses (*b*) and (*c*) of section 195 of the Criminal Procedure Code, 1898

* Criminal Application for Revision No. 5 of 1914.

THIS was an application in the exercise of the High Court's Criminal Revision.

The facts were as follows :—

The applicant was assessed in a sum of Rs. 35 as income-tax for the year 1911. He appealed to the Income-Tax Collector (J. H. Hartshorne). When examined, the applicant made a statement as to his income and supported it by his account-books which he produced.

The Income-Tax Collector was of opinion that the statement made by the applicant was false and that it was sought to be supported by false account-books. A notice was therefore issued to the applicant to show cause why sanction should not be given for prosecuting him. The Income-Tax Collector granted the sanction on the 25th July 1912. It was not communicated to the applicant. A copy of it, however, was forwarded to the Mamlatdar of Nadiad with the intimation that necessary steps should be taken to lodge a complaint in the Court of the First Class Magistrate of Kaira.

Nothing was done under the sanction till the 20th October 1913, when T. P. Lakhia, the Resident First Class Magistrate of Kaira, filed a complaint in the Court of the First Class Magistrate of Kaira, charging the applicant with offences punishable under sections 177, 193, 196 and 471 of the Indian Penal Code. The case was later on transferred by the District Magistrate to the Court of the Sub-Divisional Magistrate of Kaira. The applicant filed objections to his prosecution, but the objections were overruled.

The applicant applied to the Joint Judge at Ahmedabad ; but his application was rejected.

He next applied to the High Court.

The application was argued on the 10th and 13th March 1914.

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Velinkar, with *Ratanlal Ranchhoddas*, instructed by *Soonderdass & Co.*, for the applicant.

S. S. Patkar, Government Pleader, for the Crown.

On the 13th March 1914, the Court (Heaton and Shah, JJ.) referred the following question to a Full Bench :—

Whether an Income-Tax Collector is or is not a "Court" within the meaning of that word as used in clauses (*b*) and (*c*) of section 195 of the Criminal Procedure Code.

The following judgments were delivered :—

HEATON, J. :—The applicant in this case is a person against whom a complaint has been made of offences under sections 177, 193, 196, 199 and 471 of the Indian Penal Code. It will be observed that these are all offences which are included in section 195 of the Criminal Procedure Code. They all arose out of what the applicant is supposed to have done in connection with proceedings before an Income-Tax Collector. Now undoubtedly an Income-Tax Collector is a public servant, and as to the offence under section 177, his sanction would be required under clause (*a*) of section 195 and what appears to be a sanction was in fact given by the Income-Tax Collector. But it is now spent, or rather was spent before this complaint was made, because the complaint was made much more than six months after the sanction had been given. So far then it appears that as regards section 177 these proceedings are not lawful in their inception and should be set aside. As regards the other sections 193, 196, 199 and 471 they are subject to precisely the same infirmity if the Income-Tax Collector is a "Court" within the meaning of clauses (*b*) and (*c*) of section 195. On this matter, *i. e.*, whether an Income-Tax Collector is such a "Court", there is a certain amount of authority which, in the main, favours the view that he is a "Court". But a Bench of this Court decided in 1906 that an Income-Tax Collector is not a "Court" within the meaning of

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[illegible]

section 476 of the Criminal Procedure Code: *In re Kalidas*[1]. If he is not a "Court" within the meaning of that section it is, at least to me, difficult, in spite of the definition of "Court" in section 195, to suppose that he can be a "Court" within the meaning of the latter section; for the purpose of the two sections is very much the same and their connection is intimate.

In a very much later case (*In re Nanchand Shivchand*[2]) another Bench of this Court decided that a "District Judge", determining the validity of elections under section 22 of the District Municipalities Act (Bombay Act III of 1901) is a "Court" within the meaning of clause *(b)* of section 195 of the Criminal Procedure Code. The reasoning of Mr. Justice Batchelor's judgment in that case, is, it seems to me, a reasoning which, if applied to this case, would inevitably lead to the conclusion that an Income-Tax Collector is a "Court". He is empowered to summon witnesses, to take evidence and under the Oaths Act he consequently may administer an oath. I cannot myself believe that if giving false evidence on oath to an Income-Tax Collector is an offence under section 193 of the Indian Penal Code and it is declared to be such an offence by section 37 of the Income-Tax Act, no sanction should be required to prosecute such a person for giving false evidence, whereas sanction is required if the evidence is given, say for example, before a Magistrate or a Sub-Judge. It seems to me that the purpose of these provisions in section 195 are that when false evidence is alleged to be given on oath, the prosecution shall not proceed without a sanction, and that the Code intends to make no distinction whatever between different cases provided that the oath may properly be administered and that the evidence may be given.

(1) (1906) 8 Bom. L. R. 477. (2) (1912) 37 Bom. [illegible]

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Otherwise in some cases, as for instance, an Income-Tax Collector's proceedings, complaints for giving false evidence might be made by any private person, they might be made out of ill-will and without the slightest foundation of truth. And yet the Magistrate would be bound to deal with them. I can see no reason whatever for supposing that the section intends such a thing to happen when it specifically provides that in other cases sanction must be furnished. Therefore not only does the reasoning in Mr. Justice Batchelor's judgment seem to me to be opposed to the decision of *In re Kalidas*[1], but it also appeals to me as being a reasoning which is correct in itself. But we cannot altogether disregard the ruling in *In re Kalidas*[1]. Therefore it seems to me that we are bound to submit to a Full Bench this question:—

Whether an Income-Tax Collector is or is not a "Court" within the meaning of that word as used in clauses (*b*) and (*c*) of section 195 of the Criminal Procedure Code?

There is only one other point that needs attention in this matter. It was argued that because the complaint, which was made against this applicant, was lodged by a certain Mr. Lakhia by order of the District Magistrate or the Collector, and because the Collector is a public servant to whom the Income-Tax Collector is subordinate, therefore this complaint may be regarded as a complaint of the kind provided for in clause (*a*) of section 195. But that clause provides that the public servant concerned may either give a sanction or make a complaint and that seems to me to exclude the idea that a public servant may make a complaint by any form of delegation. It seems to me that he must make the complaint, if he wishes to take that course,

(1) (1906) 8 Bom. L. R. 477.

personally. If he does not wish to take that course personally, the delegation is obtained by giving the sanction. Similarly the Collector as superior officer, though personally no doubt he might make the complaint, cannot delegate the making of a complaint to another. So I do not think that the proceedings in this case can be supported by that argument.

If the decision of the Full Bench is that an Income-Tax Collector is a "Court" then I think the whole of these proceedings must be set aside.

SHAH, J.:—I concur. This is an application to quash the proceedings arising out of a complaint lodged by Mr. L P. Lakhia, the Resident First Class Magistrate of Nadiad, on the 10th October 1913. The complaint purports to have been made with the sanction of the Income-Tax Collector dated 23rd July 1912, and relates to offences which are mentioned in section 195 of the Criminal Procedure Code. It is clear that the complaint cannot be entertained by any Court, if the order of the 23rd July 1912 is a sanction and if a sanction is necessary under the section. The order of the 23rd July 1912 was made by the Income-Tax Collector after giving due notice to the petitioner, and though the terms of the order do not place the matter beyond dispute, it is fairly open to the construction that it is a sanction and not merely a departmental direction to prosecute. The complaint, so far as it relates to the offence under section 177 of the Indian Penal Code, can be taken cognizance of only with the previous sanction or on the complaint of the public servant concerned or of some servant to whom he is subordinate. Treating the Income-Tax Collector's order of the 23rd July as a sanction, the proceedings so far as they relate to the offence under section 177, Indian Penal Code, must be set aside as the sanction was not in force at the date of the complaint owing to the lapse of time. Even if it

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be not a sanction, the same result must follow, as there can be no doubt that the present complaint is not made by the Income-Tax Collector or by his superior. The present complainant, who is the Resident Magistrate at Nadiad, has nothing to do with the Income-Tax Collector or his superior, and in my opinion he can lodge the complaint only with the *sanction* of the proper authority.

As regards the other offences, which fall under section 195, sub-section (1), clauses (*b*) and (*c*), the complaint is subject to the same objection, if the Income-Tax Collector is a Court within the meaning of these clauses. It has been held by this Court in *In re Kalidas*[1] that the Income-Tax Collector is not a Court under section 476 of the Criminal Procedure Code. So far as the present point is concerned, I think the word "Court" would have the same meaning in section 195, and *Kalidas's case* is, therefore, an authority for the view that the Income-Tax Collector is not a Court within the meaning of clauses (*b*) and (*c*) of section 195. No reasons are given in the judgment in support of this conclusion, and the *ratio decidendi* of *In re Nanchand Shivchand*[2] clearly suggests that the conclusion in *Kalidas's case* is not correct. Apart from the decisions, the reason of the rule requiring a sanction or a complaint of the Court concerned in respect of certain offences is in favour of the view that the Income-Tax Collector is a Court. In a recent case the Madras High Court has held that the Income-Tax Collector is a Court: see *In re Nataraja Iyer*[3]. Having regard to the conflicting decisions, as well as to the practical importance of the point, I think that the question formulated by my learned colleague should be referred to a Full Bench for decision.

(1) (1906) 8 Bom. L. R. 477. (2) (1912) 37 Bom. 365
(3) (1912) 36 Mad. 72.

The reference was heard by a Full Bench consisting of Scott, C. J., and Batchelor and Beaman, JJ., on the 23rd March 1914.

Velinkar, with *Ratanlal Ranchhoddas*, instructed by *Soonderdass & Co.*, for the applicant.

S. S. Patkar, Government Pleader, for the Crown.

Velinkar.—In the present case, the sanction in question was granted on the 23rd July 1912. The complaint, on the strength of that sanction, was lodged on the 20th October 1913. The sanction has therefore spent itself by lapse of six months under section 195, clause 6, of the Criminal Procedure Code.

The Income-Tax Collector, under Act II of 1886, performs the functions of a Court: see sections 3 (9), 4, 14, 16, 25 (1) (2), 26, 27, 28, 30, 37 and 40. He administers oath and determines the jural relations between the appellant and the Government.

The word "Court" in section 195, clauses (*b*) and (*c*), of the Criminal Procedure Code should be liberally construed. The word is not defined. It is not confined to a Court of justice but includes a Court of law as well.

The Collector acting in appraisement proceedings under sections 69 and 70 of the Bengal Tenancy Act (Beng. Act VIII of 1885) has been held to be a "Court" as used in section 195: *Raghoobuns Sahoy* v. *Kokil Singh*[1]. A Tahsildar holding an inquiry as to whether a transfer of names in a land register should be made or not is a Revenue Court as used in section 195: *Queen-Empress* v. *Munda Shetti*[2].

But a Sub-Registrar under the Registration Act (III of 1877) has been held to be not a Court: see *Queen-Empress* v. *Tulja*[3], and rightly so, for he does not

(1) (1890) 17 Cal. 872.

(2) (1900) 24 Mad. 121.

(3) (1887) 12 Bom. 36.

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determine any jural relation between parties. The case of *In re Nataraja Iyer*[1] is an instance in point, for there the Madras High Court has held that a Divisional Officer hearing appeals under the Income-Tax Act is a Court within the meaning of section 476 of the Code.

The meaning of the term "Court" is discussed in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*[2].

The present reference owes its origin to a conflict of decision in *In re Kalidas*[3] and in *In re Nanchand Shivchand*[4]. We submit that the former decision is not correct.

Patkar.—The decision in *In re Kalidas*[3] is correct and ought to be followed.

The power of a public servant to administer an oath in any proceeding before him does not make him a Court: for an oath can be administered by a public servant under section 4 of the Oaths Act.

The inquiry by a Land Acquisition Collector as to the value of land and the amount of compensation to be paid for its acquisition, resulting in an award, is an administrative and not a judicial proceeding: *Ezra* v. *Secretary of State for India*[5].

Section 37 of the Income-Tax Act which provides that proceeding under Chapter IV of the Act shall be deemed to be a judicial proceeding enacts a statutory fiction for the purpose of sections 193 and 228 of the Indian Penal Code. It cannot make the Income-Tax Collector a Court: see *The Queen* v. *Assessment Committee of Saint Mary Abbotts, Kensington*[6].

C. A. V.

(1) (1912) 36 Mad. 72
(2) [1892] 1 Q. B. 431.
(3) (1906) 8 Bom. L R. 477.
(4) (1912) 37 Bom 365
(5) (1905) 32 Cal. 605
(6) [1891] 1 Q B 378.

SCOTT, C. J. :—The question referred for decision is "whether an Income-Tax Collector is or is not a 'Court' within the meaning of that word as used in clauses (*b*) and (*c*) of section 195 of the Criminal Procedure Code".

The word "Court" is defined in the section by a limited and exclusive definition to mean a Civil, Revenue or Criminal Court. It cannot be contended that the Income-Tax Collector is a Civil or Criminal Court and therefore the only question is whether he at any time in the discharge of his functions under Act II of 1886 is a Revenue Court.

The term "Revenue Court" is not in general use but it has been used occasionally by local legislatures in this country in connection with the decision of questions relating to revenue by officers specially and exclusively empowered to decide them. See, for example, the City of Bombay Revenue Act and the Revenue Code of Oudh, the United Provinces and the Punjab (U. P. Act II of 1901, sections 59-62 ; U. P. Act III of 1901, section 189 et seq. ; Oudh Act XXII of 1886, section 109 ; Punjab Act XVI of 1887, section 101). Speaking generally, revenue questions are removed from the cognizance of Civil Courts and the officer charged with the duty of deciding disputed questions relating to revenue between the individual and the Government would be invested with the functions of a Revenue Court. The inquiries *into such questions assigned to officers empowered eo nomine* as "Revenue Courts" in the United Provinces are entertained and disposed of by corresponding officers in Bombay under Chapters XII and XIII of the Bombay Land Revenue Code of 1879 though the word "Revenue Court" is not to be found anywhere in those chapters. We have no doubt that the Bombay inquiries would be equally proceedings in Revenue Courts in the sense in which that term is used in the definition clause of section 195 of the Criminal Procedure Code. We also think

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that inquiries conducted according to the forms of judicial procedure under Chapter IV of the Income-Tax Act and execution proceedings under Chapter V (which provides that an order passed by a Collector on a petition under Chapter IV shall have the force of a decree of a Civil Court in suit in which the Government is the plaintiff and the defaulter is the defendant) are proceedings in a Revenue Court.

The express exclusion from the term "Court" in section 195 of a Registrar or a Sub-Registrar, though a legislative recognition of the correctness of the conclusion in *Queen-Empress* v. *Tulja*[1], does not affect the question now before us as to the scope of the term "Revenue Court", for a Registrar or Sub-Registrar under the Registration Act could not by any stretch of imagination be held to be a Revenue Court. The Registration Act has its special group of sections corresponding with Chapter XI of the Indian Penal Code and sections 195 and 476 of the Criminal Procedure Code.

For the above reasons we answer the question referred in the affirmative.

On the 9th April 1914, the Divisional Court (Heaton and Shah, JJ.) passed the following order :—

Order :—Having regard to the decision of the Full Bench that an Income-Tax Collector is a "Revenue Court" within the meaning of section 195 of the Criminal Procedure Code, the proceedings are set aside and the rule issued by this Court on the 7th January 1914 is made absolute.

Rule made absolute.

R. R.

[1] (1887) 12 Bom. 36.

CIVIL REFERENCE.

Before Mr Justice Heaton and Mr. Justice Shah.

SATYABHAMABAI KOM JANARDAN KHARE, PLAINTIFF, v. GOVIND *alias* BABU BIN JANKU BADE, DEFENDANT.*

1914 *April 7.*

Limitation—Exclusion of time—Excuse of delay—Time taken up in proceedings before a conciliator—Non-granting of certificate owing to Government ending the conciliation system.

The plaintiff advanced money on a bond which became due on the 31st May 1910 He applied to the conciliator for a certificate on the 28th March 1913, but before the certificate could be had Government abolished the conciliation system with effect from the 30th May 1913. The plaintiff filed a suit to recover the money on the 30th June 1913, and he claimed to exclude from the period of limitation the time between the 28th March and 30th May 1913.—

Held, that though the plaintiff was not entitled to deduct the time from 28th March to 30th May 1913, he was entitled to such extension of time as might be necessary to give him a reasonable opportunity to enable him to file the suit in time

THIS was a reference made by B. R. Mehendale, Subordinate Judge of Dapoli, under Order XLVI, Rule 1 of the Civil Procedure Code.

The reference was in the following terms:—

Defendant passed plaintiff a money bond on 31st May 1907 making the amount repayable in three years, *i e*, on 31st May 1910. On 28th March 1913 plaintiff applied to a conciliator, under section 39 of the Dekkhan Agriculturists' Relief Act. Government Notification No 3478, dated 10th May 1913, abolished the conciliation system with effect from 30th May 1913. On this date neither an agreement had been effected under sections 44—45 of the Dekkhan Agriculturists' Relief Act between defendant and plaintiff on the application filed by the latter, before him, by the conciliator; nor had a certificate been given to plaintiff-applicant under section 46 of the same Act. Plaintiff brought her suit on 30th June 1913, alleging, among other things, that the time from 28th March 1913 to 30th June 1913 spent before the conciliator saved the claim from the statute of limitation

The question submitted for reference accordingly is:—

In computing the period of limitation prescribed for the suit in which it was necessary to file a conciliator's certificate under section 47 of the

* Civil Reference No 2 of 1914.

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Dekkhan Agriculturists' Relief Act, can the time intervening between the application made by the plaintiff, under section 39, and the conciliators ceasing to work, by reason of Government Notification No. 3478, dated 10th May 1913, be excluded?

The only provision of law as to the period of time spent before the conciliator, being excluded in computing the period of limitation for any suit, is contained in section 48 of the Dekkhan Agriculturists' Relief Act. But that section is concerned with the time between the application on the one hand, and grant of certificate on the other.

It does not contemplate any possibility, however arising, of the making of an agreement under sections 44—45 of the Act or of a grant of certificate under section 46 of the Act, being rendered impossible.

There are provisions of law, which, to some extent, give relief against hardships arising from the statute of limitation in the case of appeals and certain kinds of applications. But for obvious reasons these provisions cannot apply to suits. And no authority has been cited by the learned pleader for plaintiff, nor am I aware of any, on the strength of which I could hold that the period spent before the conciliator between the date of application and the conciliators ceasing to work by reason of the Government Notification, can be excluded, in computing the period of limitation.

In my own humble opinion, therefore, I am not in favour of excluding such time and would answer the question in the negative.

As the matter, however, is not free from reasonable doubt and a wrong decision on the point may be of considerable consequence to more than one litigant, I have ventured under Order XLVI, Rule 1, to make the said reference for favour of decision on the point by their Lordships.

S. S. Patkar, Government Pleader, for the plaintiff.

G. S. Rao (*amicus curiæ*), for the defendant.

SHAH, J. :—The facts are stated in the reference. The question submitted for our opinion is whether the plaintiff is entitled to deduct the time between his application to the Conciliator and the termination of the Conciliation system in the District (*i. e.*, from 28th March to 30th May 1913).

As no certificate is granted by the Conciliator, it is quite clear that section 48 of the Dekkhan Agriculturists' Relief Act has no application. There is no other statutory provision corresponding to section 48 to cover a

case of this kind. The period of limitation applicable, therefore, would be the period prescribed under the Limitation Act, unless the plaintiff could claim to have an extension of the time in any other way.

It is clear that the plaintiff's suit would be in time if filed on the 31st May 1913. The local Government cancelled the appointments of Conciliators in the District with effect from the 30th May 1913. The plaintiff had made his application to the Conciliator for a certificate which it was obligatory upon him to obtain at the time. Up to 30th May 1913, he could not have filed his suit without a certificate from a Conciliator All of a sudden by the Government Notification he was called upon to file his suit on the 31st May, which it was practically impossible for him to do Under these circumstances we think the plaintiff is clearly entitled to the benefit of the rule that where the law creates a limitation, and the party is disabled to conform to that limitation without any default in him, and he has no remedy over, the law will ordinarily excuse him. But this rule is subject to the limitation that it will excuse him so far as it is necessary and not beyond The cases of *Mayer* v. *Harding*[1] and *The Queen* v. *Justices of Surrey*[2] are fair illustrations of the application of this principle under somewhat different circumstances.

The plaintiff in this case would be entitled to such extension of time as would be necessary to secure him a reasonable opportunity to file the suit in time, which it became practically impossible for him to do in virtue of the Government Notification. It is not possible to lay down any general rule as to what period would be sufficient to constitute a reasonable opportunity. It must depend upon the circumstances of each particular case, which must be duly proved. Thus though the

(1) (1867) L R 2 Q B. 410 (2) (1880) 6 Q B. D 100.

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Dekkhan Agriculturists' Relief Act, can the time intervening between the application made by the plaintiff, under section 39, and the conciliators ceasing to work, by reason of Government Notification No. 3478, dated 10th May 1913, be excluded?

The only provision of law as to the period of time spent before the conciliator, being excluded in computing the period of limitation for any suit, is contained in section 48 of the Dekkhan Agriculturists' Relief Act. But that section is concerned with the time between the application on the one hand, and grant of certificate on the other.

It does not contemplate any possibility, however arising, of the making of an agreement under sections 44—45 of the Act or of a grant of certificate under section 46 of the Act, being rendered impossible.

There are provisions of law, which, to some extent, give relief against hardships arising from the statute of limitation in the case of appeals and certain kinds of applications. But for obvious reasons these provisions cannot apply to suits. And no authority has been cited by the learned pleader for plaintiff, nor am I aware of any, on the strength of which I could hold that the period spent before the conciliator between the date of application and the conciliators ceasing to work by reason of the Government Notification, can be excluded, in computing the period of limitation.

In my own humble opinion, therefore, I am not in favour of excluding such time and would answer the question in the negative.

As the matter, however, is not free from reasonable doubt and a wrong decision on the point may be of considerable consequence to more than one litigant, I have ventured under Order XLVI, Rule 1, to make the said reference for favour of decision on the point by their Lordships.

S. S. Patkar, Government Pleader, for the plaintiff.

G. S. Rao (*amicus curiæ*), for the defendant.

SHAH, J. :—The facts are stated in the reference. The question submitted for our opinion is whether the plaintiff is entitled to deduct the time between his application to the Conciliator and the termination of the Conciliation system in the District (*i. e.*, from 28th March to 30th May 1913)

As no certificate is granted by the Conciliator, it is quite clear that section 48 of the Dekkhan Agriculturists' Relief Act has no application. There is no other statutory provision corresponding to section 48 to cover a

case of this kind. The period of limitation applicable, therefore, would be the period prescribed under the Limitation Act, unless the plaintiff could claim to have an extension of the time in any other way.

It is clear that the plaintiff's suit would be in time if filed on the 31st May 1913. The local Government cancelled the appointments of Conciliators in the District with effect from the 30th May 1913 The plaintiff had made his application to the Conciliator for a certificate which it was obligatory upon him to obtain at the time. Up to 30th May 1913, he could not have filed his suit without a certificate from a Conciliator. All of a sudden by the Government Notification he was called upon to file his suit on the 31st May, which it was practically impossible for him to do. Under these circumstances we think the plaintiff is clearly entitled to the benefit of the rule that where the law creates a limitation, and the party is disabled to conform to that limitation without any default in him, and he has no remedy over, the law will ordinarily excuse him. But this rule is subject to the limitation that it will excuse him so far as it is necessary and not beyond. The cases of *Mayer* v. *Harding*[1] and *The Queen* v. *Justices of Surrey*[2] are fair illustrations of the application of this principle under somewhat different circumstances.

The plaintiff in this case would be entitled to such extension of time as would be necessary to secure him a reasonable opportunity to file the suit in time, which it became practically impossible for him to do in virtue of the Government Notification. It is not possible to lay down any general rule as to what period would be sufficient to constitute a reasonable opportunity. It must depend upon the circumstances of each particular case, which must be duly proved. Thus though the

[1] (1867) L. R. 2 Q. B. 410. [2] (1880) 6 Q. B. D. 100.

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plaintiff in this case is not entitled to deduct the time from 28th March to 30th May 1913, he is entitled to such extension of time as may be necessary to give him a reasonable opportunity to enable him to file the suit in time.

We are indebted to Mr. G. S. Rao for having argued the case on behalf of the defendant at our request.

Order accordingly.

R. R.

CIVIL REFERENCE.

Before Mr. Justice Heaton and Mr. Justice Shah.

1914 *April 7.*

RUPCHAND MAKUNDAS, PLAINTIFF *v.* MUKUNDA MAHADEV, DEFENDANT.*

Limitation—Limitation Act (IX of 1908), section 4—Exclusion of time—Certificate of conciliator—Time taken up in obtaining conciliator's certificate—Abolition by Government of the conciliation system—Closing of the Court during vacation—Suit filed on the opening day is suit filed in time—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 48.†

The plaintiff advanced money on two bonds which became due on the 24th February 1910 He applied for a conciliator's certificate on the 13th February 1913 and obtained it on the 26th April 1913. From the 28th April to the 8th June 1913 the Court was closed for the Summer Vacation. In the meanwhile, Government abolished the conciliation system with effect from the 30th May 1913. The plaintiff filed the present suit to recover the money on the 9th June 1914 and claimed to exclude the time taken up in the conciliation proceedings :—

Held, that the suit, though filed on the 9th June 1913 when the conciliation system was abolished, was substantially one to which the provisions of

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* Civil Reference No 15 of 1913.

† The section runs as follows :—

48. In computing the period of limitation prescribed for any such suit or application the time intervening between the application made by the plaintiff under section 39 and the grant of the certificate under section 46 shall be excluded.

Chapter VI of the Dekkhan Agriculturists' Relief Act were applicable throughout the period of limitation which expired during the vacation, and the plaintiff was, therefore, entitled to deduct the period between his application and the grant of the certificate.

Held also, that assuming that section 48 of the Dekkhan Agriculturists' Relief Act did not apply, as the plaintiff's suit would be strictly in time up to a certain date during the vacation, on which day he could not file it as the Court was closed, he could file it on the re-opening of the Court under section 4 of the Limitation Act.

Held further, that when the law had created a limitation, and the party had been disabled from confirming to that limitation without any default in him, and he had no remedy over, the law would ordinarily excuse him.

THIS was a reference made by M. N. Choksi, Additional First Class Subordinate Judge of Dhulia.

The reference was in the following terms :—

The plaintiff Rupchand Makundas has filed the suit to recover Rs 300, principal, and Rs. 159-12-0, interest, on two bonds dated the 3rd December 1908. The bonds are payable on 24th February 1910 The suit was filed on 9th June 1913 This Court was closed on account of the Summer Vacation from 28th April to 8th June 1913, both days inclusive The plaintiff applied to the conciliator for a certificate under the Dekkhan Agriculturists' Relief Act on 13th February 1913 and obtained the certificate on 26th April 1913 (see Exhibit 4).

The question for decision is, whether the suit is in time ? My opinion is in the negative.

REASONS

When the suit was filed on 9th June 1913, the conciliators were abolished by Government Notification No 3478, dated the 10th May 1913, and so there being no conciliators on the date of suit, no conciliator's certificate was necessary under section 48 of the Dekkhan Agriculturists' Relief Act, and so the period intervening between the dates for applying for and obtaining the certificate could not be excluded

But the plaintiff applied for the certificate before the suit was time-barred, and also obtained the certificate at a time when such certificate was necessary. His period of limitation expired during the vacation, if the period before the conciliator be excluded. The suit is therefore not free from doubt, and so I refer the above question for the opinion of their Lordships.

SHAH, J. :—On the facts stated in the reference, we are clearly of opinion that the suit is not time-barred.

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The plaintiff applied for a certificate and obtained it at a time when the conciliation system was in existence and when under the provisions of the Dekkhan Agriculturists' Relief Act it was incumbent upon him to obtain such a certificate. He could have filed the suit in time and claimed the benefit of section 48 of the Dekkhan Agriculturists' Relief Act, had it not been for the fact that the Court was closed for the Summer Vacation from the 28th April to 8th June 1913. He filed the suit on the opening day after the vacation. The incident of the Local Government having cancelled the appointments of the conciliators on the 10th May with effect from the 30th May 1913 cannot make any difference in the plaintiff's position. The suit, though filed on the 9th June when the conciliation system was abolished, was substantially one, to which the provisions of Chapter VI of the Dekkhan Agriculturists' Relief Act were applicable throughout the period of limitation which expired during the vacation. The plaintiff is accordingly entitled to deduct the period between his application and the grant of the certificate.

Assuming, however, that section 48 of the Dekkhan Agriculturists' Relief Act does not apply, as at the date of the suit there were no conciliators in the district, it is clear that the plaintiff's claim is still in time on another ground. On the facts the position is clearly this that the plaintiff's suit would be strictly in time up to a certain date during the vacation, on which day he could not file it as the Court was closed. He could file it on the re-opening of the Court under section 4 of the Limitation Act. But by the Government notification the whole position was changed, and it became impossible for the plaintiff to file his suit in time. It is clear that the law does not compel a man to do that which he cannot possibly perform. Under the circumstances we think the proper rule to apply is that when

the law creates a limitation, and the party is disabled to conform to that limitation, without any default in him, and he has no remedy over, the law will ordinarily excuse him. The facts in this case clearly entitle the plaintiff to be excused.

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Order accordingly.

R. R.

APPELLATE CIVIL.

Before Mr Justice Beaman and Mr Justice Heaward.

THE FIRM OF DOLATRAM DWARKADAS (ORIGINAL PLAINTIFF), APPLICANT, v. THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY COMPANY (ORIGINAL DEFENDANT), OPPONENT.*

1914. *June* 12.

Railway receipt—Mercantile document—Title—Endorsee—Interest in the goods—Action for damages

A railway receipt is a mercantile document of title and the endorsee of the receipt has sufficient interest in the goods covered by it to maintain an action against the Railway Company for damages in respect of the goods covered by the receipt

Amerchand & Co v *Ramdas Vithaldas* (1), followed

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the decree of G. V. Saraiya, Judge of the Court of Small Causes at Ahmedabad, in Civil Suit No. 3040 of 1912.

Suit against a Railway Company to recover damages. The facts necessary for the purpose of this report were as follows :—

On the 18th June 1912 one Sukhdin Ramlal consigned 115 bags of wheat from Rahimabad, a station on the Oudh and Rohilkhand Railway, to Ahmedabad, a station

* Application No. 234 of 1913 under the extraordinary jurisdiction.
(1) (1913) 38 Bom. 255.

1914.

DOLATRAM DWARKADAS v. B. B AND C. I. RAILWAY COMPANY.

on the Bombay Baroda and Central India Railway. The goods were consigned by Sukhdin to self, but he made an endorsement on the Railway receipt stating that the goods should be delivered to one Narandas Lakshmandas. The receipt was endorsed by Narandas in favour of the plaintiff Dolatram Dwarkadas.

The plaintiff paid the freight at Ahmedabad on the 4th July 1912 and signed the delivery book. He was allowed to take away the goods on the 19th idem on payment of Rs. 25-7-0 as demurrage. He then took delivery of 96 bags and refused to take the remaining 19 bags on the ground that they appeared to have been torn and empty and were not weighed by the station master of Ahmedabad though requested to do so.

The plaintiff brought the present suit to recover from the defendant Railway Company Rs. 277-13-6, that is, the value of the 19 bags of wheat including the amount of demurrage which was alleged to have been illegally levied.

The defendant Railway Company contended *inter alia* that the plaintiff being merely a commission agent was not entitled to maintain the suit.

The Small Cause Court Judge raised some issues of facts and recorded his findings thereon, but on the whole dismissed the suit on the ground that it was not maintainable by the plaintiff as he was a commission agent and as such could have no interest in the wheat not delivered.

The plaintiff preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) urging *inter alia* that even as commission agent the plaintiff was entitled to bring the suit, that the Railway receipt being an instrument of title and having been duly endorsed in plaintiff's favour, the defendant was bound to deliver the

consignment on production of the said receipt by the plaintiff, that the defendant having chosen to accept the freight and demurrage from the plaintiff and having taken his signature in anticipation of the delivery to him, was not entitled to refuse delivery and that the defendant having by its acts recognized the plaintiff as the person entitled to take delivery was estopped from contending that it was not liable for failure to give the delivery.

A *rule nisi* was issued which required the defendant to show cause why the decision of the Judge should not be set aside.

G. N. Thakore appeared for the applicant (plaintiff) in support of the rule.

Binning with *Crawford, Brown & Co.* appeared for the opponent (defendant) to show cause.

BEAMAN, J.:—After having given this nice question our most careful consideration we think that in view of the recent decision of this Appeal Court in *Amerchand & Co.* v. *Ramdas Vithaldas*[1], it must be taken as settled law that a railway receipt is a mercantile document of title. That being so, we think it necessarily follows that the endorsee of such a railway receipt has sufficient interest in the goods covered by it to maintain an action of this kind. We are, therefore, of opinion that the decision of the Subordinate Judge with Small Cause Court powers was not according to law. Reversing his decision upon the point just mentioned we agree with his findings of fact, and now order that the decree be made in the plaintiff's favour in the terms of those findings. The defendant Company must pay all the costs.

Decision reversed

G. B. R.

(1) (1913) 38 Bom 255.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1914 *June* 15.

BANDOO KRISHNA KULKARNI (ORIGINAL PLAINTIFF-APPLICANT), APPELLANT, *v.* NARSINGRAO KONHERRAO DESHPANDE AND ANOTHER BY VAHIWATDAR COURT OF WARDS, THE COLLECTOR OF BELGAUM, AND ANOTHER (ORIGINAL DEFENDANT-OPPONENTS), RESPONDENTS.*

Civil Courts Act (XIV of 1869), section 32—Civil Procedure Code (Act V of 1908), section 37—Decree—Court of Wards made party after decree—Execution—Jurisdiction of the Court to execute its own decree.

The Court which passed the decree has jurisdiction to proceed with the execution notwithstanding that after the decree the Court of Wards has become a party to the execution proceeding.

Gopal Apaji v. *Keshavrao Konherrao*[1], followed.

FIRST appeal against the decision of B. R. Koppikar, First Class Subordinate Judge of Belgaum, in execution of a decree under darkhast No. 443 of 1909.

The plaintiff Bandoo Krishna Kulkarni obtained a decree, No. 434 of 1897, against the defendants Narsingrao Konherrao Deshpande and Keshavrao Konherrao Deshpande in the Court of the First Class Subordinate Judge of Belgaum for the recovery of a certain sum. After the decree was passed the Collector of Belgaum took charge of the defendants' estate as Court of Wards.

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* First Appeal No. 76 of 1913.

(1) First Appeal No. 29 of 1913, Unreported. The said unreported first appeal was heard by Scott, C. J., and Batchelor, J., and decided on the 30th September 1913. The judgment was as follows :—

SCOTT, C. J. :—We see no reason why the Subordinate Judge should not have executed the decree which he had passed. We think that the learned District Judge has unnecessarily added to the successful plaintiff's costs by dismissing his darkhast, when he came to the conclusion that his was not the Court in which the decree should be executed. Acting under section 151 of the Code we set aside the order of dismissal and direct that the darkhast be returned for presentation to the Subordinate Judge for execution. Costs throughout to be costs in the darkhast.

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BANDOO KRISHNA v. NARSINGRAO

Subsequently the plaintiff having applied for the execution of the decree, the Collector of Belgaum in his capacity as the Court of Wards was joined as a party to the execution proceeding. The First Class Subordinate Judge dismissed the darkhast for execution on the ground that he had no jurisdiction to entertain it under section 32 of the Civil Courts Act (XIV of 1869). The Subordinate Judge further relied upon an unreported judgment of the High Court under the extraordinary jurisdiction in Civil Application No. 58 of 1911 in which it was held "that suits to which the Court of Wards is a party cannot be heard by the Courts of Subordinate Judges".

Against the said order of dismissal the plaintiff-applicant appealed.

Jayant G. Rele for the appellant (plaintiff-applicant):—The lower Court erred in referring us to the District Court. Section 32 of the Civil Courts Act applies to the institution of suits and not to proceedings in execution. When the present suit was filed, the Court of Wards was not a party to it. Therefore the Court of the First Class Subordinate Judge had jurisdiction to entertain it and that jurisdiction was not taken away because the Court of Wards was subsequently made a party in the execution proceeding: *Hari Govind* v. *Narsingrao Konherrao*[1], *Gopal Apaji* v. *Konherrao*[2]. An application for execution is not a suit but a proceeding in the suit: *Venkata Chandrappa Nayanivaru* v. *Venkatarama Reddi*[3].

N. A. Shiveshvarkar for the respondents (defendant-opponents):—The Court of Wards being joined as a party to the execution proceeding, the jurisdiction of the Subordinate Judge to entertain the darkhast for execution was ousted. Section 37 (*b*) of the Civil Procedure Code lends support to our contention. If the

(1) (1913) 38 Bom 194. (2) See note to *ante* p 662.
(3) (1898) 22 Mad 256

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Court of Wards had been made a party to the suit the Subordinate Judge could not have entertained the suit at all under section 32 of the Civil Courts Act.

BEAMAN, J. :—The only question arising in this First Appeal is whether the Court of the Subordinate Judge had jurisdiction to proceed with the execution of its own decree. When the suit was instituted no Government servant was a party to it, and it was not until after the decree that the Court of Wards was added. In terms, therefore, section 32 of the Civil Courts Act does not apply. But it is contended inferentially with reference to section 37 of the Civil Procedure Code that where a party is added in execution, who, had he been a party when the suit, wherein the decree was passed, was instituted, would have deprived the Court of its jurisdiction, that Court ceases to have jurisdiction for all purposes of executing its own decree. That contention gained some colour from section 37. But we find that the facts here cannot be distinguished in any material particular from the facts in *Gopal Apaji* v. *Keshavrao Konherrao*[1], where a Bench of this Court decided that the Court which passed the decree had jurisdiction to proceed with the execution, notwithstanding that after the decree the Court of Wards had become a party to the execution proceeding. And we see no reason to doubt that that case was correctly decided, nor why by giving a different decision here on the same facts we should encourage uncertainty and a conflict of opinion. We, therefore, think that the present appeal must be allowed, and the Court below be directed to proceed with the execution of the decree. The appellant must have the costs of this appeal.

Appeal allowed.

G. B. R.

(1) See note to *ante* p. 662.

APPELLATE CIVIL.

Before Mr Justice Heaton and Mr Justice Shah.

DAJI BABAJI SAWANT AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* SAKHARAM KRISHNA KULKARNI (ORIGINAL DEFENDANT NO. 1), RESPONDENT.* 1914. *July 29.*

Civil Procedure Code (Act V of 1908) Order XLI, Rule 27—Appellate Court—Admission of fresh evidence—Practice regarding admission

Where an appellate Court desires to admit fresh papers in evidence under Rule 27 of Order XLI of the Civil Procedure Code (Act V of 1908) it must record its reasons in writing for doing so and admit them formally in evidence.

SECOND appeal from the decision of V. G. Kaduskar, Additional First Class Subordinate Judge with Appellate Powers at Ratnagiri, reversing the decree passed by E. F. Rego, Subordinate Judge at Malvan.

Suit for declaration.

The plaintiffs sued for a declaration that certain lands belonged to them. The declaration was granted by the Subordinate Judge.

The defendant appealed. On appeal, the Court sent for, at the plaintiffs' instance, certain papers in a revenue inquiry concerning the lands. The papers were not formally exhibited in the case, nor were any reasons recorded for having sent for the papers. The Court proceeded to weigh this new evidence along with other evidence in the case and dismissed the suit.

The plaintiffs appealed to the High Court.

D. W. Pilgaokar for the appellants.

Nilkantha Atmaram for the respondent.

SHAH, J.:—The main point argued in this appeal relates to the question of the admissibility of certain evidence which the lower appellate Court considered

* Second Appeal No. 742 of 1913.

for the first time in appeal. That evidence consists of certain papers relating to a revenue inquiry. During the course of the argument we were led to think that these papers were looked at and considered by the Court without the knowledge and consent of the present appellants. It turns out, however, that these papers were sent for expressly on the application of the plaintiffs, and the pleaders on both sides were heard after these papers were received and before the judgment was pronounced. No objection has been taken to this procedure in the memo of appeal to this Court. Under these circumstances it is quite clear that so far as the present appellants are concerned, they have no just grievance at all as regards the procedure adopted by the lower appellate Court with reference to these papers.

At the same time we think that it was necessary for the lower appellate Court to have complied with the provisions of Rule 27 of Order XLI before taking these papers into consideration; and if it thought, either with the consent of the parties or on the application of any one of the parties, that there was sufficient ground to admit these papers, the reasons for admitting them in evidence should have been stated, and they should have been formally admitted in evidence. The lower appellate Court no doubt acted improperly in considering the papers without formally admitting them in evidence. But having regard to the facts which we have already mentioned, it is quite clear that the appellants cannot be allowed to object to the procedure which they invited the Court to adopt.

On a consideration of the whole evidence in the case, including these papers, the lower appellate Court has come to definite conclusions on questions of fact, *viz.*, that the plaintiffs have not proved their title, and that the defendant has been in possession of the lands for

over twelve years prior to the date of the suit. These findings must be accepted. On these findings it is quite clear that the decree passed by the lower appellate Court is proper.

We, therefore, confirm the decree of the lower appellate Court with costs.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

MESSRS. KING KING & Co. (ORIGINAL PLAINTIFFS AND DECREE-HOLDERS), RESPONDENTS, *v.* MAJOR F. D. DAVIDSON (ORIGINAL DEFENDANT AND JUDGMENT-DEBTOR), APPLICANT.° 1914 *February 2.*

Civil Procedure Code (Act V of 1908), section 60, clause 2 (b)—Army Act, 1881 (44 & 45 Vict. c. 58), sections 136 and 190, sub-section 8 as amended by Army (Annual) Act, 1895 (58 & 59 Vict., c. 7), section 4—Officer on the Indian Staff Corps—Money decree—Execution—Salary not liable to attachment.

Messrs. K. K. & Co. filed a suit and obtained a decree for a sum of money against Major D., an officer in the Indian Army. They subsequently attached a moiety of that officer's pay under Order XXI, Rule 48 of the Civil Procedure Code and in pursuance of such attachment the Deputy Controller of Military Accounts remitted such moiety to the Sheriff of Bombay who had paid out a portion of the moneys received by him under Messrs. K. K. & Co.'s attachment and had in his hands a further sum which in the ordinary course would have been paid out likewise, when Major D. took out a summons calling on the plaintiffs to show cause why their attachment should not be raised and the sums recovered thereunder refunded.

Held, that Major D. under section 190, sub-section 8 of the Army Act, 1881, was an Officer of His Majesty's Regular Forces and under section 136 of the Army Act, 1881, and section 60 of the Code of Civil Procedure he was entitled to receive his pay without any deduction and that the attachment must be raised and that the Sheriff must pay to Major D. the sum received by him under the attachment and not yet paid away.

° Suit No. 303 of 1911.

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Held, however, that, as the moneys actually paid out to the execution creditors had not been paid out under coercion or under a mistake of fact, though possibly under a mistake of law, Major D. was not entitled to a refund of such moneys.

ON the 25th of July 1911 the plaintiffs in this suit obtained a decree against the defendant, then a Captain in the Indian Army, in the High Court of Bombay for payment of a sum of money and costs. The defendant having failed to pay, the plaintiffs obtained an order under Order XXI, Rule 18, for the attachment of a moiety of the defendant's pay as it accrued due from time to time, notice of which order was sent to the Deputy Controller of Military Accounts, 5th (Mhow) Division, as the officer whose duty it was to disburse the defendant's salary, and that officer from time to time remitted to the Sheriff of Bombay a moiety of the defendant's salary. Subsequently Messrs. Amerchand Hazarimal & Co., a Marwari firm, who had obtained a decree against the defendant in Civil Suit No. 290 of 1907 in the Court of the First Class Subordinate Judge at Poona, applied for and obtained an order under section 73 of the Code of Civil Procedure for the rateable distribution of the moneys in the hands of the Sheriff.

A portion of the moneys received by the Sheriff was paid out by him under the plaintiffs' attachment and a portion remained in the possession of the Sheriff. On the 24th of January 1914 the defendant issued a summons against the plaintiffs to show cause why the attachment levied by them on the defendant's salary should not be raised and why all moneys recovered under the said attachment should not be refunded to the defendant and why the Sheriff should not repay to the defendant the moneys realised under the said attachment and

(1) (1912) 37 Bom 26.

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which had not yet been distributed between the plaintiffs and the other judgment-creditors.

The summons was argued on the 2nd of February 1914.

Nicholson, for the plaintiffs-respondents.

Moos, for Messrs. Amerchand Hazarimal & Co. :—The defendant is an army officer and therefore his pay cannot be attached : see *Velchand* v. *Bourchier*[1].

The moneys in the hands of the Sheriff must be refunded.

But as regards the return of the moneys already paid to us, the defendant knew of the attachment and has made no objection until now The defendant has allowed payments to be made and then after a year comes forward and asks for all previous payments to be refunded.

The defendant might argue that he did not know his legal rights, and therefore payment was made in mistake of law. Parties cannot afterwards recover : see Halsbury's Laws of England, Vol. 21, page 32 ; Pollock on Contracts, page 183 ; *Aiken* v *Short*[2].

Inverarity, for the defendant-applicant, refers to *Calcutta Trades Association* v. *Ryland*[3] ; *Watson* v. *Lloyd*[4] ; *Colonel Lecky* v. *Bank of Upper India, Limited*[5] ; *Velchand* v. *Bourchier*[1]

Both the Calcutta and Madras cases take no notice of the definition of "Regular Forces" in section 190 of the Army Act, 1881, nor of the proviso to section 60 of the Civil Procedure Code.

The defendant's commission is not in the Indian Army but in the Land Forces.

(1) (1912) 37 Bom 26
(2) (1856) 1 H & N 210
(3) (1896) 24 Cal 102
(4) (1901) 25 Mad 402
(5) (1911) 33 All 529

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See Halsbury, Vol. 14, page 32, as setting aside of wrongful or irregular execution: see also *Kanhaya Lal* v. *National Bank of India, Ld.*[1]. Payment made under the force of execution proceedings is a payment made under compulsion and can be recovered back.

It is not a mistake of law, it is a case of private right; a private right to have our salary paid to us in full without any interference by judgment-creditors.

See Leake on Contract, page 230; Indian Contract Act, section 72.

The attachment should be set aside from the commencement unless barred by limitation: see article 181, Limitation Act. The order ought to be that the money should be returned to the Sheriff.

Captain, for the defendant-applicant (in Suit No. 290 of 1907), refers to *In re Smith. Ex parte Brown*[2].

Moos, in reply.

In this case the judgment-debtor is asking for his money back; he should be estopped by his conduct.

MACLEOD, J.:—Messrs. King, King & Co. obtained a decree against Major Davidson, then a Captain in the Indian Army, in Suit No. 303 of 1911 on the 25th of July 1911 for a sum of Rs. 4,454-15-3 and costs and further interest. In execution of the said decree the plaintiffs attached a moiety of defendant's pay, and in pursuance of such attachment the Deputy Controller of Military Accounts remitted to the Sheriff such moiety. Thereafter Amarchand Hajarimal & Co., who had obtained a decree against the same defendant in Suit No. 290 of 1907 in the Court of the First Class Subordinate Judge at Poona, transmitted their decree to this Court for execution, and applied for rateable distribution between themselves and Messrs. King, King & Co., under section

(1) (1913) 40 Cal 598 (2) (1888) 20 Q. B. D. 321.

73 of the Civil Procedure Code. Rs. 2,384-2-11 paid to the Sheriff as aforesaid have been rateably distributed between the two execution plaintiffs. There is now in the hands of the Sheriff the further sum of Rs. 2,979-12-7, which in the ordinary course would be distributed in like manner. But on the 20th of January 1914 the defendant took out a summons in the Poona Suit No. 290 of 1907, calling upon the plaintiffs to show cause why the attachment levied by them on the salary of the defendant should not be raised and why the sum of Rs. 2,384-2-11 recovered by the plaintiffs under such attachment should not be refunded. On the 24th of January the defendant took out a similar summons against the plaintiffs in Suit No 303 of 1911. I adjourned the summonses into Court, and they were argued before me on the 2nd of February.

In the face of the decision of a Bench of this Court in *Velchand* v. *Bourchier*[1], counsel for the plaintiffs were unable to contend that the attachment on the defendant's pay could be continued. In that case the defendant was an Officer in a British Regiment; but the reasons given by the learned Judges for their decision apply equally to an Officer in the Indian Army. In *Calcutta Trades Association* v. *Ryland*[2] and in *Watson* v. *Lloyd*[3], the defendants were Officers of the Indian Staff Corps, and in both cases it was held that there was a distinction between an Officer of the Indian Staff Corps and an Officer of the Regular Forces. But no reference was made to section 190, sub-section 8, of the Army Act of 1881, from which it is clear that Officers of the Indian Staff Corps or the Indian Army are also Officers of His Majesty's Regular Forces. Nor in either of those cases was any reference made to sub-section 2, sub-clause (*b*), of section 266 of the Civil Procedure Code

(1) (1912) 37 Bom 26 at p 31
(2) (1896) 24 Cal 102
(3) (1901) 25 Mad 102

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of 1882. This has been reproduced in section 60 of the Code of 1908 which was held in *Velchand* v. *Bourchier*[1] to be a bar to the Court considering whether an Officer in the Army fell within the definition of "public officer" given in the Civil Procedure Code. Therefore, there can be no doubt that the defendant is entitled to receive his pay without any deduction, and that the attachment levied by the plaintiffs in Suit No. 303 of 1911 must be raised. The Sheriff must also pay to the defendant the sum of Rs. 2,979-12-7 which he realized under the attachment and which has not yet been distributed between the plaintiffs.

The question whether the plaintiffs can be ordered to refund to the defendant what has already been paid to them by the Sheriff under the attachment depends on whether the money so received by them can be considered as having been paid by the defendant under coercion, or money voluntarily paid under a mistake of fact. It was admitted by the defendant's counsel that he had had no objection to Messrs. King, King & Co. receiving the moiety of his pay under the attachment levied by them. It was only when he discovered that the plaintiffs in the Poona suit were obtaining a share in that moiety that he decided to question the validity of the attachment. It must be taken, therefore, that the money paid out by the Sheriff was not money paid under coercion. Nor was it money paid under a mistake of fact. It was paid because the defendant did not choose to apply to the Court to raise the attachment. If there was any mistake in the matter it was one of law, that is to say, the defendant must be taken as having under mistake considered that the attachment on his pay was permitted by law. Though it is also possible that there was no mistake of any sort, the defendant preferring

(1) (1912) 37 Bom 26 at p 31.

that Messrs. King, King & Co. should be paid their debt in this manner. Therefore, in my opinion, defendant is not entitled to a refund of what has already been paid out to the execution plaintiffs.

It was suggested in argument that the defendant might be estopped from claiming a refund; and it is quite possible that the plaintiffs may have acted upon the belief arising from the defendant making no attempt to dispute the attachment that he acquiesced in it. But, as far as this case is concerned, there is no evidence on which a case of estoppel could be founded.

Attorneys for the plaintiffs: *Messrs. Captain and Vaidya.*

Attorneys for the defendant: *Messrs. Craigie, Blunt and Caroe.*

H. S. C.

APPELLATE CIVIL.

Before Mr Justice Beaman and Mr. Justice Hayward

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ARJUNA BIN RAGHU NAROLE (ORIGINAL OPPONENT, AUCTION-PURCHASER), APPLICANT, v. KRISHNAJI VENIMADHAV WALIMBE (ORIGINAL PLAINTIFF), OPPONENT *

Civil Procedure Code (Act V of 1908) sections 68, 70, Rule 14,† Order XXI, Rule 101—Decree—Execution by Collector—Court functus officio *for the time being—Exhaustion of all the power conferred upon the Collector for execution—Matters requiring to be done in execution must be done by the Court which passed the decree.*

After a decree has been transferred to a Collector for execution the Court which passed that decree is for the time being *functus officio* for all purposes of execution, but as soon as the Collector has exhausted all the power of

* Application No. 147 of 1913 under the extraordinary jurisdiction

† Rule 14 framed under section 70 of the Civil Procedure Code (Act V of 1908) is as follows —

14. When the property sold is in the occupancy of the judgment-debtor, or of any other person, and a certificate in respect thereof has been granted under the last preceding rule, the Collector or other official aforesaid shall on

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execution conferred upon him by Rule 14 framed under section 70 of the Civil Procedure Code (Act V of 1908), then any matters requiring to be done, and usually regarded as in execution, must be done by the Court which made the decree

Pita v. *Chunilal*(1), referred to.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the order passed by V. N. Rahurkar, First Class Subordinate Judge of Satara, in Miscellaneous Application No. 2 of 1913, in an execution proceeding.

The proceeding in execution of a decree was transferred by the Court of the First Class Subordinate Judge of Satara to the Collector under section 68 of the Civil Procedure Code, Act V of 1908.

The Collector in due course sold certain property in execution and granted a certificate of sale to the auction-purchaser Arjuna bin Raghu Narole and put him in possession by dispossessing a third party named Krishnaji. Krishnaji, thereupon, applied to the First Class Subordinate Judge for being restored to possession. The Subordinate Judge granted the application on the following grounds :—

The applicant is dispossessed His title is derived from a sale-deed subsequent to the mortgage on which the decree was obtained The applicant was in actual possession His sale deed was registered He was not a party. The auction-purchaser cannot oust the applicant otherwise than in due course of law. The application is allowed with costs

Against the said order the auction-purchaser preferred an application under the extraordinary jurisdiction

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application by the purchaser, order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, by proclaiming to the occupant by beat of drum, or in such other manner as may be customary, at some convenient place that the interest of the judgment-debtor has been transferred to the purchaser, and, if need be, by removing any person who refuses to vacate the same

(1) (1906) 31 Bom 207

(section 115 of the Civil Procedure Code, Act V of 1908) and a *rule nisi* was issued requiring the plaintiff to show cause why the order of the Subordinate Judge should not be set aside on the grounds *inter alia* that the lower Court had no jurisdiction to make the order in execution and that the execution proceeding having been transferred to the Collector, the Collector alone could pass any order that might be necessary.

Jayakar with *K. N. Koyaji* for the applicant (auction-purchaser):—The execution proceeding having been transferred to the Collector, he alone had jurisdiction to deal with matters arising in execution under the Rules made under section 70 of the Civil Procedure Code: *Ragho Chandrarao* v. *Hanmati Chandrarao*[1]. It would be disastrous if the Collector and the Court should both carry out the execution proceeding simultaneously. Sections 68 to 70 of the Civil Procedure Code empower the Collector to carry out the execution: *Muhammad Said Khan* v. *Payag Sahu*[2]. Under the Rules under section 70 the Collector has to hear claims, etc. If the Collector dispossesses a third party, he can undo his own act. The Court has no jurisdiction.

Gadgil with *D. R. Patvardhan* for the opponent (plaintiff):—The Collector can only act so far as the Rules framed under section 70 of the Civil Procedure Code permit. He cannot act beyond them: *Pita* v. *Chunilal*[3].

Jayakar in reply:—The case relied on has no application. It was a case of setting aside a sale and Rule 17 especially provides that the applicant should be referred to the Civil Court

BEAMAN, J.:—A decree was sent to the Collector for execution under section 68 of the Civil Procedure Code.

(1) (1913) 37 Bom 488 (2) (1894) 16 All 228
(3) (1906) 31 Bom 207.

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The Collector appears to have put up the property of the judgment-debtor for sale, to have sold it, and given the purchaser a sale-certificate. Thereafter the present opponent, claiming to be in possession in his own right, appears to have obstructed the auction-purchaser, and the Collector removed him, as he has power to do, under Rule 14 made under section 70 of the Civil Procedure Code. Thereupon the opponent went to the Court which passed the decree and obtained from it an order under Rule 101 of Order XXI. Against this the present applicant, the auction-purchaser, has moved this Court in the exercise of its extraordinary jurisdiction to declare that the Subordinate Judge's order under Order XXI Rule 101 was made, in the circumstances stated, without jurisdiction. I think that the true answer to the question which arises here, a question which must frequently arise in similar cases, is that the execution entrusted to the Collector was completed and must have been completed before the Court which made the decree could properly be invited to make or certainly before it could properly have made any order under Rule 101. I agree that in principle there could not be two Courts executing the same decree at the same time, and this appears to me to have been the reason underlying Burkitt, J.'s decision in *Muhammad Said Khan* v. *Payag Sahu*[1]. But when we examine the Rules framed under section 70, and it is under those Rules alone that the Collector exercises his powers, it will be seen that in the execution of the decree he is authorized to do a certain number of necessary acts, while on the other hand his powers are much less extensive than those conferred upon an ordinary Court executing its own decree under Order XXI. So that while I do not demur to the principle I have stated, namely, that after a decree has been transferred to a Collector the Court

[1] (1894) 16 All. 228

which passed that decree is for the time being *functus officio* for all purposes of execution, I also say that as soon as the Collector has exhausted all the power of execution conferred upon him by Rule 14 framed under section 70, then any matters requiring to be done, and usually regarded as in execution, such as those provided for in Rules 97 to 103, for example of Order XXI, must be done by the Court which made the decree. Otherwise there might certainly arise situations in which parties have suffered wrong at the hands of a Collector tied down by the Rules conferring upon him very restricted powers, and yet be entirely without redress. This can never have been the intention of the legislature, and were authority needed, I might refer to a decision by Sir Lawrence Jenkins to which I myself was a party in *Pita* v. *Chunilal*[1]. There again, I think, the reason is precisely and accurately stated by the learned Chief Justice and that reason will certainly cover the present case. We are, therefore, of opinion that the order complained of was not *ultra vires* but made in the exercise of jurisdiction vested in the learned Judge who made it, and was very properly made. The rule must, therefore, be discharged with all costs.

HAYWARD, J. :—This application raises the question whether a Collector's order dispossessing a third party in execution under Rule 14 of the Rules in force under section 70 of the Civil Procedure Code can be called in question by that third party by application to the Court under Rules 100 and 101 of Order XXI of the Civil Procedure Code.

The powers of the Collector in execution must be looked for either in schedule III or in the Rules in force or framed under section 70 of the Code. Where powers are conferred on the Collector the effect is to oust the

[1] (1906) 31 Bom 207.

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jurisdiction to that extent of the Court as provided by sub-section 2 of section 70 of the Code. Now the Collector has been granted power to dispossess third parties in execution under Rule 95 of Order XXI of the Code by the inclusion of that provision in Rule 14 in force under section 70 of the Code. But the Collector has not been granted power to hear the grievances of third parties after being so dispossessed in execution under Rules 100 and 101 of Order XXI of the Code. This power must, therefore, be deemed to have been left with the Court and not to have been taken away under sub-section 2 of section 70 of the Code. "If the power has by rules been vested in the Collector, then it is exercisable by him and not by the Court. If that power has not been conferred on him, then . . . the power must continue still to be exercisable by the Court," as was stated by Jenkins, C. J., in the case of *Pita* v. *Chunilal*[1].

The rule on this application must, therefore, in my opinion also, be discharged with costs inasmuch as it proceeds on the alleged want of jurisdiction of the lower Court.

Rule discharged.

G. B. R.

(1) (1906) 31 Bom 207 at p 217.

APPELLATE CIVIL.

Before Mr Justice Beaman and Mr Justice Hayward

VENIDAS NARANDAS AND OTHERS (ORIGINAL PLAINTIFFS) APPELLANTS, *v.* BAI HARI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.[*]

1914. *June 18.*

Bhagdari Act (Bombay Act V of 1862) section 3[1]—Bhag—Permanent tenancy of lands in existence prior to the passing of the Bhagdari Act (Bombay Act V of 1862)—Alienation by permanent tenant—Death of the alienor—Intervention by Collector—Eviction of the alienee—Alienation by permanent tenant not null and void.

In a Bhag a person who claimed to be a permanent tenant and who was found to be so prior to the passing of the Bhagdari Act (Bombay Act V of 1862), sold his permanent tenancy to the plaintiffs. After the death of the plaintiffs' vendor, the Collector intervened under section 3 of the Bhagdari Act (Bombay Act V of 1862), removed the plaintiffs and placed the Bhagdar in possession. The plaintiffs having brought a suit against the Bhagdar to recover possession

[*] Second Appeal No. 147 of 1912.

[1] Section 3 of the Bhagdari Act (Bombay Act V of 1862) is as follows:—

3. It shall not be lawful to alienate, assign, mortgage or otherwise charge or encumber any portion of any Bhag or Share in any Bhagdari or Narwadari village other than a recognized sub-division of such Bhag or Share, or to alienate, assign, mortgage or otherwise charge or encumber any homestead, building site (Gabhan) or premises appurtenant or appendant to any such Bhag or Share, or recognized sub-division appurtenant or appendant thereto apart or separately from any such Bhag or Share or recognized sub-division thereof.

Any alienation, assignment, mortgage, charge or encumbrance contrary to the provisions of this section, shall be null and void; and it shall be lawful for the Collector or other Chief Revenue Officer of the District, whenever he shall, upon due inquiry, find that any person or persons is or are in possession of any portion of any *Bhag or Share* of any *homestead building site* (Gabhan), or premises appurtenant or appendant to such Bhag or Share in any Bhagdari or Narwadari village other than a recognized sub-division of such Bhag or Share, in violation of any of the provisions of this section, summarily to remove him or them from such possession, and to restore the possession to the person or persons whom the Collector shall deem to be entitled thereto:

and any suit brought to try the validity of any order or orders which the Collector may make in such matter must be brought within three months after the execution of such order or orders.

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VENIDAS NARANDAS v. BAI HARI.

The plaintiffs preferred a second appeal and it was argued before the Bench composed of Scott, C. J., and Chandavarkar, J., on the 30th September 1912 when the following interlocutory judgment was delivered :—

SCOTT, C. J. :—Assuming that leases to permanent cultivators were recognized by custom at the time of the introduction of the Bhagdari Act in 1862, there would be a presumption that the words prohibiting alienation, assignment, mortgage or other charge or incumbrance were not intended to deprive Bhagdars of a customary mode of providing for cultivation, namely by the creation of permanent tenancies (See *Ravji Narottam* v. *Purushottam Girdhar*(1) and Government Publication 278, New Series, p 10, para. 43) If permanent leases are not prohibited by section 3, I do not think the section can cover alienations of the leasehold interest That may be forbidden by custom or by express provision but the existence of the custom or provision is a matter of evidence. The question was raised by issue 2 in the Sub-Judge's Court but no evidence has been recorded. I think the case should be remanded for a finding on the following issues —

1 Is it customary in Bhagdari villages to cultivate by means of permanent tenants ?

2 If so, is there any custom limiting the power of the tenant to alienate his holding ?

3 Has the Collector by custom any right of interference in the event of such alienation ?

Findings to be returned in three months

Parties will be at liberty to adduce evidence on these issues.

CHANDAVARKAR J —I concur.

On the remitted issues the District Judge found as follows :—

It is customary, that is, common, in Bhagdari villages to cultivate by means of permanent tenants, that is, by hereditary tenants ; (2) There was no custom *limiting* the power of the tenant to alienate his holding ; and (3) The Collector had no right by custom of interference in the event of such alienation.

The District Judge having certified the said findings to the High Court, the second appeal was heard by Scott, C. J., and Batchelor, J., on the 13th August 1913,

(1) (1864) 2 Bom H. C. R 231 at p. 235 (2nd Edn).

and the following interlocutory judgment was delivered by—

SCOTT, C. J. —From the evidence taken upon the remand and discussed by Mr. Kindersley in his judgment we can see that the question disposed of by the lower Courts without the discussion of any evidence, namely, as to the exact scope of section 3 of the Bhagdari Act, having regard to the system of cultivation in Bhagdari Villages, is one of considerable difficulty. The case has been tried on the assumption that the plaintiffs' transferor is a permanent tenant, although evidence was led both by the plaintiffs and the defendants, and the status of the plaintiffs' transferor is not admitted The defendants are not willing that the case should be disposed of in appeal upon that assumption. We think that in the interests of justice the case should be remanded for trial upon the first two issues raised by Mr Bhatt in the Court of first instance on the evidence already recorded Findings should be returned within 3 months

On the remand the District Judge found on the said issues that—

1 The plaintiffs were purchasers from a permanent tenant

2 The permanent tenancy commenced before the passing of Bombay Act V of 1862.

After the said findings were certified to the Court the second appeal was finally argued.

G. K. Parekh for the plaintiff-appellants.

G. N Thakore for defendant-respondents 1—3.

BEAMAN, J :—One Sakhidas, claiming to be a permanent tenant of lands in a Bhag, sold his permanent tenancy right to the plaintiffs The Collector, after the death of Sakhidas, intervened under section 3 of Bombay Act V of 1862, removed the plaintiffs, and placed the Bhagdar, now defendant, in possession. The plaintiffs then brought this suit and the Courts below decided against them.

On second appeal a Bench of this Court consisting of Scott, C. J., and Chandavarkar, J , remanded three issues to the lower appellate Court. The first two are interesting because they indicate clearly enough that at that

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time the learned Judges were disposed to think that if permanent tenants existed in these Bhagdari and Narwadari tenures their rights of alienation could only be restricted by custom. It might be difficult to reconcile that opinion with another decision given by Scott, C. J., and Batchelor, J., in *Jijibhai* v. *Nagji*[1], but for the purposes of this judgment it will be sufficient, I think, to confine that case to its own facts, bearing in mind particularly the course of this litigation.

These three issues having been found upon by the lower appellate Court, the first two virtually in favour of the present plaintiffs-appellants, the case came on a second time before Scott, C. J., and Batchelor, J. Those learned Judges again remanded two issues to the lower appellate Court because in the then state of the record it did not appear that it had either been found on the evidence or admitted that the plaintiffs' vendor was a permanent tenant. The lower appellate Court has found on the two issues so remanded that the plaintiffs' vendor was a permanent tenant, and that the permanent tenancy dated back to a time prior to the passing of the Bhagdari Act of 1862. This is clearly a finding of fact, and the decision of the case must be based upon the vendor of the plaintiffs having been a permanent tenant of the land within a Bhag before the enactment of 1862. Having regard to the policy of that Act expressed in the preamble, and to the general reason of its provisions in respect of alienations, we think that it is not necessary to give an absolutely literal and verbal interpretation to the very sweeping language of section 3. But even were that necessary, we should still with some confidence hold that on the facts found a permanent tenancy precedent to the passing of the Act of 1862 was a right in the permanent

(1) (1909) 11 Bom. L. R. 693.

tenant not described in section 3 by the words "any portion of a bhag or share, etc." As we understand that section, its intention was to preserve a certain tenure, called the Bhagdari or Narwadari tenure, and the status of persons enjoying that tenure, and the means devised by the Legislature were clearly intended to prevent the dismemberment of lands belonging to such privileged classes under that tenure. But we think that it cannot be said that the mere geographical position of the lands held in permanent tenancy before the passing of that Act necessarily prevents alienations of such tenancies within either the verbal definition or the spirit of section 3. If the learned Judges who first remanded this case were right in contemplating at least the possibility of an existing permanent tenancy, should such be found, being alienable, unless restricted by custom notwithstanding the provisions of section 3, then there would be no difficulty whatever in holding after the findings of fact on the second remand that the plaintiffs' vendor was such a permanent tenant before 1862, and that no custom has been proved restricting his right of alienation. The principle to which we seek to give effect, although it may be difficult to reconcile with the single decision I have referred to in *Jijibhai* v. *Nagji*[1], is at least intelligible, simple and capable of uniform application, and that is, that where rights are found to have existed before the Bhagdari Act in persons, not themselves Bhagdars or Narwadars, but the *locus* of whose rights fell within what are called the Bhags or shares in the Bhagdari and Narwadari village, those rights never were "any portion of such Bhags or shares of Bhagdari or Narwadari village, etc.," within the meaning of section 3 and, therefore, it will follow naturally that the prohibitions against alienations contained in section 3 would have

(1) (1909) 11 Bom L R 693

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no applicability to the class of cases, we are describing. It appears to us that this is clearly such a case and, therefore, that the alienation by the permanent tenant to the present plaintiffs was not prohibited under section 3, was not null and void, and, therefore, the Collector was wrong in removing the plaintiffs.

For these reasons we think that the plaintiffs' claim, including mesne profits to be determined in execution, must be decreed with all costs.

HAYWARD, J. :—I entirely concur. It appears to me that the permanent tenancy was a good alienation inasmuch as it took effect before the passing of the Bhagdari Act (Bom Act V of 1862). The permanent tenancy so created thereupon ceased to be any portion of the Bhag. It became independent property carved out of what was previously the Bhag. The only rights left were the rights to receive rent from the permanent tenant. That was the only interest left in the Bhag. No custom has been shown limiting in any way the right of alienation of a permanant tenant and there would ordinarily be nothing to prevent a permanent tenant giving full rights to his alienee, notwithstanding the fact that on failure of his own heirs there might, in default of alienation, have been a reversion to the Bhagdar. The only property rendered inalienable was the right already referred to of receiving rent from the permanent tenant which remained vested in the Bhagdar. That and that alone could properly be held to come within the definition of "portion of a Bhag" and to have been rendered inalienable by the subsequent passing of the Bhagdari Act of 1862.

Decree reversed and claim decreed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr Justice Hayward.

VYANKATESH MAHADEV (ORIGINAL DEFENDANT), APPLICANT, v. RAMCHANDRA KRISHNA (ORIGINAL PLAINTIFF), OPPONENT.* 1914. *June 25*

Civil Procedure Code (Act V 1908), Order XXIII, Rule 3, Schedule II, clauses 1-16—Suit—Reference to arbitration without leave of Court—Application to stay further progress of the suit—Application not according to law

After the institution of a suit, the plaintiff and one of the defendants entered into an agreement to submit the matter in difference between them to arbitration without the leave of the Court Thereupon the defendant having applied to the Court to stay the further progress of the suit, the Court rejected the application on the ground *inter alia* that the reference did not amount to an adjustment of the matter in suit within the meaning of Order XXIII, Rule 3, of the Civil Procedure Code (Act V of 1908). On appeal by the defendant the District Judge confirmed the order

The defendant having applied under the extraordinary jurisdiction,

Held, confirming the order that where the Court was seized of a cause, its jurisdiction could not be ousted by the private and secret act of parties and if they, after having invoked the authority of the Court and placed themselves under its superintendence, desired to alter the tribunal and substitute a private arbitrator for the Court, they must proceed according to the law laid down in the first sixteen clauses of the Second Schedule of the Civil Procedure Code (Act V of 1908)

Held further that parties litigating in Court had perfect liberty to compose their differences amongst themselves into any lawful agreement, compromise or satisfaction and that when this was done they had only to apply to the Court under Order XXIII, Rule 3, of the Civil Procedure Code (Act V of 1908), but that a mere agreement to refer to arbitration, even though in other respects valid, *could not be such an adjustment in whole or in part of the suit as the* Court could give effect to under Order XXIII Rule 3

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the order of C Fawcett, District Judge of Poona, confirming the order passed by M R. Chaubal, Second Class Subordinate Judge of Poona

The plaintiff filed a suit for partition in the Court of the First Class Subordinate Judge of Poona and while

*Application No 251 of 1913 under the extraordinary jurisdiction.

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the suit was pending, he and defendant 1 agreed to refer their dispute to private arbitration without the leave of the Court. Defendant 1, thereupon, on the 16th February 1913 made an application to the Court to stay further proceedings in the suit. The application was as follows:—

On 8th December 1912 after appointing the Panchas it was agreed to refer the whole dispute to them with a view that the Panch should decide the subject-matter of the suit finally after taking the evidence of the parties. Now therefore the decision about the dispute between the parties in respect of the subject-matter of the suit must be arrived at by the Panchas appointed by the parties, and by them only The matter now cannot be legally proceeded with in the Court This is the objection of the defendant. The Court (it is prayed) should frame an issue about this objection and should make a preliminary decree on the decision of this issue.

A notice of the said application was given to the plaintiff and he stated in reply that the persons who were requested by him to act as arbitrators on his behalf were not willing, that the defendant's application did not correctly state the facts, that there had been no appointment of arbitrators at all, and that for the said reasons the suit should proceed.

The Subordinate Judge, after hearing the arguments of the parties, found that the agreement had been entered into by the plaintiff under a mistake of fact and that there had been no adjustment of the suit within the meaning of Order XXIII, Rule 3, of the Civil Procedure Code. He, therefore, rejected the application.

Defendant 1 having appealed, the District Judge dismissed the appeal without going into the question whether there was any mistake of fact on plaintiff's part in entering into the agreement.

Defendant 1 presented an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) urging *inter alia* that

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the first Court had no jurisdiction to continue the proceedings after the agreement was entered into by the parties, that a decree should have been passed in terms of the agreement, that the proceedings in the suit should have been stayed and that the District Judge was wrong in not going into the question in respect of the agreement. A *rule nisi* was issued which required the plaintiff to show cause why the order of the lower Court should not be set aside.

Coyaji, with *B. V. Vidwans*, for the applicant (defendant 1) in support of the rule:—We submit that (1) the agreement to refer is an adjustment of the suit as contemplated in Order XXIII, Rule 3, of the Civil Procedure Code, corresponding to section 375 of the Code of 1882, and (2) on account of the agreement the further progress of the suit was barred under section 21 of the Specific Relief Act.

All the High Courts are in agreement that a submission plus the result of it, namely, the award, is an adjustment under Order XXIII, Rule 3. The question is whether submission alone is an adjustment. There is no distinct ruling of this High Court on the point. The Madras and the Calcutta High Courts are against our contention. They, however, proceeded on the ground that references to arbitration were specially dealt with by a chapter in the Civil Procedure Code relating thereto and, therefore, section 375 of the Code of 1882 should not be held to include a reference: *Tincowry Dey* v. *Fakir Chand Dey*[1], *Bhajahari Saha Banikya* v. *Behary Lal Basak*[2], *Venkatachala* v. *Rangiah*[3], *Pragdas* v. *Girdhardas*[4], *Rukhanbai* v. *Adamji*[5], *Harakhbai* v *Jamnabai*[6].

(1) (1902) 30 Cal 218
(2) (1906) 33 Cal 881
(3) (1911) 36 Mad 353
(4) (1901) 26 Bom 76
(5) (1908) 33 Bom 69
(6) (1912) 37 Bom 639

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Our submission is that the chapter relating to arbitration was not restrictive; and because it made no provision for the case where the parties to a pending suit refer their dispute to arbitration without the intervention of the Court, it did not follow that the agreement could not be recogized by the Court and properly as an adjustment of the suit.

In any case the suit could not be proceeded because of the agreement. Section 22 of the Specific Relief Act barred it: *Harivalabdas Kalliandas* v. *Utamchand Manekchand*[1] followed in *Sheo Dat* v. *Sheo Shankar Singh*[2].

D. A. Khare and *J. R. Gharpure* for the opponent (plaintiff) to show cause:—The facts show that there was no agreement in fact. Further as found by the first Court we were misled on a material point of fact.

A mere agreement is not an adjustment of a suit: *Ghulam Khan* v. *Muhammad Hassan*[3], *Tincowry Dey* v. *Fakir Chand Dey*[4], *Rukhanbai* v. *Adamji Shaik Rajbhai*[5] where *Samibai* v. *Premji Pragji*[6] is commented upon, *Budha* v. *Haku*[7].

Next, even supposing that there was a submission it was inadmissible in law and it was not made with the permission of the Court.

Rule 18 of Schedule II of the Civil Procedure Code contemplates proceedings before suit: *Peruri Suryanarayan & Co.* v. *Gullapudi Chinna*[8] and *Ramjidas Poddar* v. *Howse*[9] where section 19 of the Indian Arbitration Act has been interpreted, and that section and Rule 18 of Schedule II of the Code will be found, on comparison, to be similarly worded.

(1) (1879) 4 Bom. 1
(2) (1904) 27 All 53.
(3) (1901) 29 Cal. 167.
(4) (1902) 30 Cal. 218.
(5) (1908) 33 Bom 69 at p. 74
(6) (1895) 20 Bom. 304.
(7) (1882) P. R. No. 130 of 1882.
(8) (1909) 34 Bom. 372
(9) (1907) 35 Cal. 199.

Lastly, we revoked our submission, if there was any, immediately after the mistake of fact was discovered and before the other arbitrators joined or any action was taken.

To bring a suit within Rule 18 there must be a subsisting agreement. As we revoked the agreement it cannot avail the defendant at all: *Randell* v. *Thompson*[1], *Deutsche Springstoff Actien Gesellschaft* v. *Briscoe*[2].

BEAMAN, J.:—A suit had been instituted and it is alleged that the plaintiff and one of the defendants after the institution of the suit entered into an agreement to submit the matters in difference between them to arbitration. Thereupon the defendant moved the Court to stay the further progress of the suit. The first Court refused, and on appeal the learned District Judge was of opinion that the defendant's application could not be sustained and that the suit must proceed.

We are asked to interfere in the exercise of our revisional jurisdiction and to set aside that order of the learned District Judge It apears to me that the agreement alleged to have been made between the plaintiff and one of the defendants does not fall under any of the clauses of the Second Schedule of the Civil Procedure Code. The first 16 of those clauses exhaust the whole process of arbitration after the suit has been instituted, and the parties desire to submit their differences to arbitration under the control of the Court. The Court under those 16 clauses controls completely the whole course of the reference, indeed the reference is its own, and its jurisdiction is never at any time ousted until a good award has been made. In the event of an award having been made, but being set aside for any reason, the Court immediately resumes its jurisdiction and

(1) (1876) 1 Q. B. D. 748 (2) (1887) 20 Q. B. D. 177.

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completes the trial of the action. The next class of cases provided for in the Second Schedule are those in which persons who have not instituted any legal proceedings desire to submit any difference between them to arbitration. Having agreed to do so either party may then bring the agreement into Court, and if resisted by the other party, his application to have the agreement filed and further action taken upon it will be treated as a suit. Thereafter, again the Court immediately assumes and retains control of the subsequent arbitration proceedings. The third and the last case provided for in the Second Schedule is where the parties who have not come into Court have, not only agreed to refer matters in difference between them to arbitration, but have obtained an award. Here again the party desiring to enforce the award may bring it into Court and upon proper proceedings obtain a decree in conformity with it. There remains only one single clause 18, which is of an exceptional character, and virtually re-enacts a portion of section 21 of the Specific Relief Act, which is declared to have no applicability to any arbitration proceeding provided for in the Second Schedule. That clause, which is also to be found almost *in totidem verbis* in section 19 of the Arbitration Act, provides for a special class of cases in which after parties have agreed to submit matters in difference between them to arbitration, one of them in violation of such agreement institutes a suit in respect of any or all of those matters. Then the other party may set up in bar of the suit the agreement to submit to arbitration. If this analysis be correct, and I think there is no doubt but that it is, it is clear that what the defendant here relies upon is an agreement nowhere provided for in the Second Schedule of the Civil Procedure Code, nor does it fall within the language or the spirit of section 18, for that section, as I say, is designedly restricted to cases in which the suit

complained of has been instituted after the agreement to refer to arbitration. It might be objected that no solid ground in reason can be found for refusing to extend the principle of that section to cases where after a suit had been instituted parties had privately agreed to submit the matters in difference between them to arbitration, and in spite of such agreement and in violation of it one of them insists on going on with the suit. The answer to that appears to me to be short and simple, and to cover other objections which might arise upon other points I have very generally indicated, for, in my opinion, where the Court is seized of a cause its *jurisdiction cannot be ousted by the* private and secret act of parties, and if they, after having invoked the authority of the Court, and placed themselves under its superintendence, desire to alter the tribunal and substitute a private arbitrator for the Court, they must proceed according to the law laid down in the first 16 clauses of the Second Schedule. Therefore it appears to me that there is no force whatever in the applicant's contention that a private agreement of this kind is on the same footing as the private agreement contemplated in clause 17 reproducing old section 523, nor, as I have just explained, will it give him any right to invoke the assistance of clause 18. How then could it serve him? Only as a lawful agreement by which the suit had been adjusted wholly or in part. Doubtless any parties litigating in Court have perfect liberty to compose their differences amongst themselves by entering into any lawful agreement, compromise or satisfaction. And when this is done they have only to apply to the Court to act under Order XXIII, Rule 3. But it is equally clear that a mere agreement to refer to arbitration, even though it be in other respects valid, could not be such an adjustment in whole or in part of the suit as the Court could give effect to under Order XXIII, Rule 3.

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In my opinion, therefore, the learned Judge below was right and no case whatever has been made out for the exercise of our revisional jurisdiction. I would, therefore, dismiss this application with all costs.

HAYWARD, J. :—The plaintiff brought a suit against the defendant No. 1 with regard to a certain matter which was subsequently referred by them to private arbitration without leave of the Court. The defendant No. 1 thereupon applied for stay of the suit in consequence of a reference to private arbitration outside the Court.

The orginal Court refused to stay the suit, holding that the reference had been made under a mistake of fact, and that in any case it did not amount to an adjustment of the matter in suit within the meaning of Order XXIII, Rule 3, of the Civil Procedure Code.

The first appeal Court did not decide the question as to mistake of fact, but held that there was no adjustment inasmuch as there had been no award within the meaning of Order XXIII, Rule 3, and that further the suit could not be held to be barred by the contract to refer as that contract was entered into subsequent to suit and was not prior to suit as contemplated by section 21 of the Specific Relief Act. Moreover, it pointed out that that provision had been repealed by Rule 22 of the Second Schedule of the Civil Procedure Code.

On this application for revision it has been contended, though the contention has not been very seriously pressed, that the submission to arbitration did as a matter of fact amount to a lawful adjustment, but there does not seem to me to be any substance in that contention as there was no resulting award as explained in the cases of *Rukhanbai* v. *Adamji*[1] and *Venkatachala* v. *Rangiah*[2]. It is to be observed that there was a

[1] (1908) 33 Bom. 69. [2] (1911) 36 Mad. 353.

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resulting award in *Harakhbai* v. *Jamnabai*[1] in which case it was held by the present learned Acting Chief Justice that there was a good adjustment within the meaning of Order XXIII, Rule 3, to which effect could be given under the saving provisions of section 89 of the Civil Procedure Code.

But it has been contended, and strenuously contended, that a stay ought to have been granted of the suit. It has been argued that notwithstanding the pendency of the suit it was open to the parties to enter into an agreement to arbitrate privately, without leave of the Court, and to proceed to have that private reference to arbitration or the resulting award converted into an independent decree of the Court. It appears to me, however, that the matter is concluded by the wording of Rule 3 and Rule 15 occurring among the first 16 Rules referring to arbitration during pendency of a suit with the consent of the Court. Rule 3 lays down the conditions upon which jurisdiction in the suit shall be withdrawn from the Court and that condition is that there has been an order of reference under that Rule by the Court. As no other condition is stated, it must be presumed that that is the only condition under which the suit could be removed from the jurisdiction of the Court. Then again Rule 15 expressly provides the conditions under which jurisdiction in the suit can be resumed by the Court. It states that that can occur when the award either becomes void or has been set aside by order of the Court. Again as these are the only circumstances under which jurisdiction can again be resumed by the Court, it must be presumed that there are no other circumstances under which such jurisdiction could be resumed by the Court. A ruling to the contrary has been quoted to us in the case of *Harivalabdas Kalliandas* v. *Utamchand Manekchand*[2] and

[1] (1912) 37 Bom 639 [2] (1879) 4 Bom 1.

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NARANDAS VRIJBHUKHANDAS v. BAI SARASWATIBAI.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the decree of H. K. Mehta, Additional Joint Subordinate Judge of Ahmedabad.

One Mahasukhram Chhaganlal died in March 1898 leaving a widow Parvati, who died on the 13th April 1907, and a daughter Saraswati, plaintiff 1. In 1907 Saraswati gave birth to a son Natwarlal Keshavlal, minor plaintiff 2. Mahasukhlal had executed a will, dated the 20th February 1898. Under the will the testator gave a life estate to his widow and made certain other provisions as to bequests and the management of his estate. The material portion of the will was as follows :—

Thus the management should be continued till my wife lives and after her death my daughter Saraswati's sons, if any, shall be the heirs, *i. e.*, owners of the whole of my property. But till they attain majority and reach the age of 18 and if they are of good characters my brothers, *i. e.*, cousins who might be surviving at that time shall manage my property as follows. If my daughter Saraswati comes to live in my house in which I lived she should be given Rs. 150 every year for her maintenance from the amount deposited by me as said above. She shall also take the rent of the house No. II. If the said Saraswati may have had a son, my brothers should hand over all my property whatever may be to the said son of Saraswati no sooner he attains the age of 18, and bears good character. And when the said son may make use of it just as he pleased. In case my daughter may not have sons but may have daughters then each daughter should be given ornaments worth Rs. 500. And they may do with them as they like. And my said cousins, if any, surviving, *i.e.*, my brothers shall be the owners, *i. e.*, heirs of the property that may have been left ultimately after the death of my daughter Saraswati. If none of them survives any living male member in their lines shall be the owners and take possession of my whole property with full authority and shall do with it as they please. None of my relatives nor anybody else has any claim over it and if any one holds out his claim it is null and void by this writing.

In the year 1909 the plaintiffs brought the present suit for the proper construction of the said *will*, for administration of the testator's estate under the direction of the Court and for an account of the management

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resulting award in *Harakhbai* v. *Jamnabai*[1] in which case it was held by the present learned Acting Chief Justice that there was a good adjustment within the meaning of Order XXIII, Rule 3, to which effect could be given under the saving provisions of section 89 of the Civil Procedure Code.

But it has been contended, and strenuously contended, that a stay ought to have been granted of the suit. It has been argued that notwithstanding the pendency of the suit it was open to the parties to enter into an agreement to arbitrate privately, without leave of the Court, and to proceed to have that private reference to arbitration or the resulting award converted into an independent decree of the Court. It appears to me, however, that the matter is concluded by the wording of Rule 3 and Rule 15 occurring among the first 16 Rules referring to arbitration during pendency of a suit with the consent of the Court. Rule 3 lays down the conditions upon which jurisdiction in the suit shall be withdrawn from the Court and that condition is that there has been an order of reference under that Rule by the Court. As no other condition is stated, it must be presumed that that is the only condition under which the suit could be removed from the jurisdiction of the Court. Then again Rule 15 expressly provides the conditions under which jurisdiction in the suit can be resumed by the Court. It states that that can occur when the award either becomes void or has been set aside by order of the Court. Again as these are the only circumstances under which jurisdiction can again be resumed by the Court, it must be presumed that there are no other circumstances under which such jurisdiction could be resumed by the Court. A ruling to the contrary has been quoted to us in the case of *Harivalabdas Kalliandas* v. *Utamchand Manekchand*[2] and

[1] (1912) 37 Bom 639. [2] (1879) 4 Bom 1.

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it has been pointed out that that ruling was apparently approved of by one of the Judges in the case of *Pragdas* v. *Girdhardas*[1] but it seems to me that caution must be observed in giving weight to that distant authority in view of the observations of the Privy Council in the case of *Ghulam Khan* v. *Muhammad Hassan*[2]. The Privy Council there appear to have taken the view that the Rules corresponding to the present Rules of the Code were exclusive, and the only Rules permitting arbitration during the pendency of a suit before a Court, and that the succeeding Rules corresponding to Rules 17 to 21 of the Second Schedule of the Code applied solely to arbitration in matters which had not come as suits before the Court. The Privy Council's decision has been so interpreted both by the Calcutta and Madras High Courts in the cases of *Tincowry Dey* v. *Fakir Chand Dey*[3] and *Venkatachala* v. *Rangiah*[4].

It has also to be observed that stay of a suit instituted after the reference to arbitration would alone appear to be contemplated by the wording of Rule 18 of the Second Schedule which is almost identical with the concluding 37 words of section 21 of the Specific Relief Act, and that interpretation is borne out by the cases of *Peruri Suryanarayan & Co.* v. *Gullapudi Chinna*[5] and *Ramjidas Poddar* v. *Howse*[6] dealing with the corresponding section 19 of the Indian Arbitration Act. So that this application would have been bound to fail whether it had been possible to have recourse to Rule 18 of the Second Schedule of the Civil Procedure Code or the concluding words of section 21 of the Specific Relief Act or section 19 of the Indian Arbitration Act. It appears to me, therefore, that this application must be dismissed, and the order of the

(1) (1901) 26 Bom. 76 at p. 80.
(2) (1901) 29 Cal. 167.
(3) (1902) 30 Cal. 218.
(4) (1911) 36 Mad. 353.
(5) (1909) 34 Bom. 372.
(6) (1907) 35 Cal. 199.

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first appeal Court confirmed, and it is, therefore, unnecessary to discuss the further question raised whether the decision of the learned Judge would or would not have amounted to irregularity in the exercise of the jurisdiction within the meaning of section 115 of the Civil Procedure Code. Rule discharged with costs.

Rule discharged.

G. B. R.

APPELLATE CIVIL.

Before Mr Justice Beaman and Mr Justice Hayward

1914 *June 29.*

NARANDAS VRIJBHUKHANDAS AND OTHERS (ORIGINAL DEFENDANTS 1, 2 AND 3), APPELLANTS v. BAI SARASWATIBAI AND OTHERS (ORIGINAL PLAINTIFFS) RESPONDENTS.*

Will—Construction—Life estate to daughter—Bequest to daughter's sons—On failure of the bequest the estate to go to the testator's cousins absolutely—No son born to the daughter at the death of the testator—Failure of the bequest to daughter's son—Not a case of intestacy—Operation of the bequest in favour of the testator's cousins—The intention of the testator to retain his estate in his own family, that is, in the hands of his cousins

A testator in his will provided *inter alia* that his daughter should have a life estate of Rs 150 and the rent of a house and in the event of her having a male child or male children, he or they should take the whole estate of the testator on attaining the age of 18 and then bearing a good character Should the daughter have no male issue, then on her death, the whole of the testator's estate was to go to his cousins absolutely The daughter having borne no male issue during the life-time of the testator, the intended bequest to her male issue failed: *Tagore case, Ganendra Mohan Tagore* v. *Jatindra Mohan Tagore*(1). A question having arisen as to whether the condition of the daughter having a son (at the death of the testator) not being fulfilled, there was a case of intestacy,

Held that there was no intestacy The intention of the testator was to give the whole of his property to his grandson (daughter's son) That intention having failed, the dominant intention of the testator was, subject to his daughter's life estate, to retain the estate in his own family, that is to say, in the hands of his cousins.

* Second Appeal No 527 of 1913

(1) (1872) 9 Ben. L. R. 377.

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NARANDAS VRIJBHUKHANDAS v. BAI SARASWATIBAI.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the decree of H. K. Mehta, Additional Joint Subordinate Judge of Ahmedabad.

One Mahasukhram Chhaganlal died in March 1898 leaving a widow Parvati, who died on the 13th April 1907, and a daughter Saraswati, plaintiff 1. In 1907 Saraswati gave birth to a son Natwarlal Keshavlal, minor plaintiff 2. Mahasukhlal had executed a will, dated the 20th February 1898. Under the will the testator gave a life estate to his widow and made certain other provisions as to bequests and the management of his estate. The material portion of the will was as follows :—

Thus the management should be continued till my wife lives and after her death my daughter Saraswati's sons, if any, shall be the heirs, *i. e.*, owners of the whole of my property. But till they attain majority and reach the age of 18 and if they are of good characters my brothers, *i. e.*, cousins who might be surviving at that time shall manage my property as follows. If my daughter Saraswati comes to live in my house in which I lived she should be given Rs 150 every year for her maintenance from the amount deposited by me as said above. She shall also take the rent of the house No II. If the said Saraswati may have had a son, my brothers should hand over all my property whatever may be to the said son of Saraswati no sooner he attains the age of 18 and bears good character. And when the said son may make use of it just as he pleased. In case my daughter may not have sons but may have daughters then each daughter should be given ornaments worth Rs. 500. And they may do with them as they like. And my said cousins, if any, surviving, *i.e.*, my brothers shall be the owners, *i. e.*, heirs of the property that may have been left ultimately after the death of my daughter Saraswati. If none of them survives any living male member in their lines shall be the owners and take possession of my whole property with full authority and shall do with it as they please. None of my relatives nor anybody else has any claim over it and if any one holds out his claim it is null and void by this writing.

In the year 1909 the plaintiffs brought the present suit for the proper construction of the said will, for administration of the testator's estate under the directions of the Court and for an account of the management

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by the defendant-executors. The plaintiffs further averred that when Mahasukhram died, plaintiff 1 had no son, therefore, the disposition in the will in favour of daughter's son became inoperative and void and owing to the failure of the said bequest, the other disposition in favour of the brothers (cousins) of the testator also failed, and plaintiff 1, the daughter of the testator, became the absolute owner.

The defendants, the executors under the will and their legal representatives, answered *inter alia* that plaintiff 1, Saraswatibai, was not entitled to bring the suit for the construction of the will and the administration of the estate, that the construction sought to be put upon the will by the plaintiffs was not correct, that the disposition in the will in favour of the testator's brothers (cousins) should they be alive and in their absence in favour of their descendents was valid in law and that on a proper construction of the will, plaintiff 1 could not in any way become the full owner of the testator's estate.

The Subordinate Judge found that the provisions of the will so far as they related to the appointment of plaintiff 1's son was invalid because no son of plaintiff 1 was in existence on the date of the testator's death, that the bequest in favour of the testator's cousins failed as the contingency on which that bequest depended did not happen and had become impossible of fulfilment and that the balance in the hands of the defendants could be determined after a preliminary decree had been passed and accounts taken from them.

On the 30th September 1911 the Subordinate Judge adjourned the case to the 18th December next for making a final decree.

On appeal by defendants 1, 2 and 3 the District Judge confirmed the decree.

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by the defendant-executors. The plaintiffs further averred that when Mahasukhram died plaintiff 1 had no son, therefore, the disposition in the will in favour of daughter's son became inoperative and void and owing to the failure of the said bequest, the other disposition in favour of the brothers (cousins) of the testator also failed, and plaintiff 1, the daughter of the testator, became the absolute owner.

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Defendants 1, 2 and 3 preferred a second appeal.

G. N. Thakore for the appellants (defendants 1, and 3).

M. K. Mehta for respondents 1 and 2 (plaintiffs 1 and 2).

BEAMAN, J. :—In this suit the plaintiff Bai Saraswati, daughter of the testator Mahasukhram, sued on behalf of herself and her minor son for the construction of a will. It has been contended on behalf of the appellants, the cousins of the deceased testator, that the minor has not been properly represented in this litigation since his interests are manifestly in conflict with those of his natural mother Saraswati. In the view we take, however, we think that it is impossible that the minor could be prejudiced. It has not been contended here, and we think that it could not be contended, that upon any construction of the will the minor would obtain any portion of the estate, nor is he under the Hindu Law an heir to the deceased in the event of there being an intestacy. The minor, therefore, has clearly no real interest in this suit. The contest lies between Saraswati, who in the event of an intestacy would take the whole estate, and the cousins of the deceased Mahasukhram, who are the appellants here.

Both the lower Courts have found that upon a proper construction of the will there is an intestacy, and that the daughter Saraswati is, therefore, entitled to the whole estate. We think the learned Judges below were in error. The will is the work of an inexpert layman, and it would be unreasonable to look for too great technical accuracy in its composition. But reading it as a whole we can feel no doubt as to the general scheme of the will and what the real desire and intention of the testator were. Briefly the will provides first a life estate for his widow Parvati. She has since died. Next the will provides that on the death of

Parvati, his daughter Saraswati should have a life estate of Rs. 150 and the rent of a house. In the event of his daughter Saraswati having male children or a male child, that male child (or possibly male children, if there should be more than one) is or are to take the whole estate of the testator on attaining the age of 18, and then bearing a good character. Presumably, if Saraswati should then have been surviving, the testator's intention was that her sons should provide for her as no provision appears in the will for the continuance of her maintenance after her male issue should have attained the age of eighteen years and at that time borne a good character. The appellants' cousins or, as they are called in this will sometimes, brothers of the deceased testator, are the general executors of the will and trustees of the life estates provided in the will, and also trustees for the minor male son or sons of Saraswati until they should attain the age of 18. Then follows a clause which has given rise to the main contest in this suit, and that is, that should Saraswati have no male issue then on her death, that is to say, on the termination of her life estate, the whole of the testator's estate is to go to the appellants, his cousins, absolutely.

Now Saraswati bore no male child during the life-time of the testator. The intended bequest, therefore, to her male issue, should she have any, fails under the rule in the *Tagore case* (*Ganendra Mohan Tagore* v. *Jatindra Mohan Tagore*[1]). After the death of the testator she has had male issue, and her son, the minor in this suit, still lives. It has, therefore, been contended, and that contention has prevailed in both the Courts below, that by reason of the apparent condition, namely, should Saraswati have no sons (that condition not having been fulfilled) the appellants cannot take after the death of Saraswati, and since the intended

[1] (1872) 9 Ben L. R. 377.

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that he meant the appellants to take the estate after the death of Saraswati precisely as though no son had been born to her. In our opinion, therefore, it would clearly defeat the intention of the testator were we to adopt the view that in the events which have happened there has been an intestacy and so give the whole estate to Saraswati. As between her and appellants it is clear beyond all possibility of argument that the testator preferred the appellants, and desired that they should take the whole estate after having provided a suitable maintenance for Saraswati during her lifetime, nor can we find anything upon a reasonable construction of the will as it stands, in the events which have happened, to preclude us from giving effect to that intention. In our opinion, therefore, the decree of the lower appellate Court must be reversed, and it must now be declared that Saraswati is entitled to the life estate reserved to her upon the condition stated in the will, and that thereafter the appellants are entitled to take the whole estate. All costs to come out of the estate.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

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SAYAD MIR GAZI VALAD SAYAD KUTBUDIN (ORIGINAL PLAINTIFF), APPELLANT, v. MIYA ALI VALAD MAULVI ABDUL KADIR (ORIGINAL DEFENDANT), RESPONDENT.*

Registration Act (III of 1877), section 17, clauses (a) (b) and (h)—Registration Act (XVI of 1908), section 17, exception (v)—Registered conveyance—Simultaneous unregistered document to re-convey—An ordinary agreement to sell—Exemption from registration.

The plaintiff and the defendant agreed that plaintiff should nominally sell the property in suit out and out to the defendant and thereafter to attorn to

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bequest to the son actually in existence cannot take effect either, there is an intestacy. We are entirely unable to accede to this contention. What we are to look at, and if we are able to ascertain it to give effect to, is the intention of the testator. In doing so, we must be governed by general principles such as are to be found stated in cases like that of *Jones* v. *Westcomb*[1] and many others in the English Law Reports. Now here it is perfectly clear that the dominant intention of the testator, after providing a suitable life estate for his widow, was to give the whole of his property to his grandson. That intention has unhappily been defeated as no grandson was alive at the date of his death. Failing this it is equally clear that his dominant intention was to retain his estate in his own family, that is to say, in the hands of the appellants, his cousins. To the best of his ability he appears to us to have carefully guarded against the effect of there being an intestacy, namely, his estate passing absolutely into the hands of his daughter Saraswati.

Nor do we think that so literal and strict a construction ought to be put on the condition annexed to the appellants' taking the estate after the death of Saraswati. That this could not have been the testator's intention is perfectly clear from other clauses in the will. Thus he expressly annexed a condition in the event of his grandson taking the estate that the boy shall attain the age of 18 and shall be of good character. Clearly then if the will is to have any meaning he must have contemplated the possibility of his grandson, should any such have been in existence at his death, not attaining the age of 18 or not being of good character at that time, and in either event, although this is not actually expressed, it would be equally clear

(1) (1711) 1 Eq. Cas., Abr. 245.

that he meant the appellants to take the estate after the death of Saraswati precisely as though no son had been born to her. In our opinion, therefore, it would clearly defeat the intention of the testator were we to adopt the view that in the events which have happened there has been an intestacy and so give the whole estate to Saraswati. As between her and appellants it is clear beyond all possibility of argument that the testator preferred the appellants, and desired that they should take the whole estate after having provided a suitable maintenance for Saraswati during her life-time, nor can we find anything upon a reasonable construction of the will as it stands, in the events which have happened, to preclude us from giving effect to that intention In our opinion, therefore, the decree of the lower appellate Court must be reversed, and it must now be declared that Saraswati is entitled to the life estate reserved to her upon the condition stated in the will, and that thereafter the appellants are entitled to take the whole estate. All costs to come out of the estate.

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(1) (1711) 1 Eq. Cas., Abr. 245

On the 25th July 1910 the plaintiff brought the present redemption suit alleging that as the registered sale deed and the agreement were simultaneously executed, they must be read together and the transaction amounted to a mortgage by conditional sale and that Rs. 1,799 were due to the defendant at the foot of the mortgage. The plaintiff further averred that if the Court did not hold the transaction to be a mortgage, then an order might be passed directing the plaintiff according to the terms of the agreement to pay to the defendant Rs. 1,499, the amount of the sale price, and Rs. 300 as the amount of the rent, with a direction to the defendant to pass a re-conveyance and return the old documents.

The defendant contended *inter alia* that the registered sale deed and the agreement were not executed simultaneously and that the two transactions were independent of each other.

The Subordinate Judge found that the sale deed and the agreement were passed simultaneously, that for want of registration the agreement was inadmissible to prove that it and the sale deed constituted a mortgage by conditional sale and that the sale deed and the

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agreement read together did not constitute a mortgage by conditional sale. He, therefore, dismissed the suit.

The plaintiff having appealed, the District Judge remanded the case on the following ground:—

The plaint asked for specific performance of the contract of resale if the transaction was held not to be a mortgage, but through some oversight of parties an issue to this effect was not framed and the point was ignored. Looking to the facts of the case, I think it would only prolong litigation and cause needless expense if the parties are allowed to fight out separately the question of specific performance. There is another suit between the parties regarding this very property and it is pending now. The parties have agreed to have all the disputes between them decided by one suit, and the plaintiff-appellant has accepted some of the conditions proposed by the respondent in his purshish exhibit 9 He is not willing to deposit Rs. 384 in Court, as he will have to borrow this money at interest, but he is willing to give security for the due payment of the "rent" and also to arrange that the sub-tenants pay the rent due to the respondent This condition is quite reasonable.

The plaintiff having undertaken to abide by the conditions mentioned above, I remand the suit to the lower Court and direct the Court to frame issues to determine the questions whether the plaintiff can treat the agreement as a contract and sue for specific performance Parties are at liberty to produce evidence on the new issues

On the remand the Subordinate Judge found that (1) the plaintiff could not treat the agreement as a separate contract and sue for specific performance of that contract and (2) the suit for the specific performance of the contract was within time.

After the receipt of the said findings the District Judge dismissed the appeal.

The plaintiff preferred a second appeal.

Coyaji with *P. B. Shingne* for the appellant (plaintiff):—In the plaint we had clearly made a prayer in the alternative. If the apparent sale deed cannot be held to be a mortgage, then we can very well claim to have the agreement to re-convey enforced *according* to law. If so, then the prayer for the specific performance

[illegible]

[illegible]

of the contract is sufficient to dislodge the respondent-defendant from his position. The agreement to re-convey is in writing and does not require registration. The right created by the writing is merely a right *in personam*: *Burjorji Curselji Panthaki* v. *Muncherji Kuverji*(1), *Chunilal Panalal* v. *Bomanji Mancherji Modi*(2), *Shridhar Ballal Kelkar* v. *Chintaman Sadashiv Mehendale*(3).

D. A. Khare, *T. R. Desai* and *M. P. Mehta* for the respondent (defendant).—The agreement to re-convey cannot be treated as an independent contract. It requires registration. *Mutha Venkatachelapati* v. *Pyanda Venkatachelapati*(4). The sale deed and the agreement to re-convey disclose one transaction, as is clear from the fact that the plaintiff wanted to have the two documents read together as creating a mortgage. Hence the agreement is inadmissible as evidence of a personal obligation and the whole transaction should not be divided into two. Section 17 of the Registration Act is applicable.

BEAMAN, J.:—On the 9th of September 1903 the plaintiff and the defendant undoubtedly intended to mortgage the property now in suit. The defendant being a good Musalman scrupled to take interest. It was accordingly agreed that the plaintiff should nominally sell the property out and out to the defendant and thereafter attorn to him for an amount of rent which would represent reasonable interest. This conveyance was executed and duly registered. Contemporaneously the defendant executed an agreement to the plaintiff to re-convey the property for the same consideration, namely Rs. 1,499, when called upon to do so. If we look at the true intention of the parties we should have no doubt

(1) (1880) 5 Bom 143
(2) (1883) 7 Bom 310
(3) (1893) 18 Bom 396.
(4) (1903) 27 Mad 348.

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but that this was really, though in form a sale, a mortgage. Inasmuch, however, as the plaintiff very naturally did not register his part, that is to say, the agreement given to him by the defendant at the time, the Court below refused to treat the whole transaction together as a mortgage. So far defeated, the plaintiff fell back upon the alternative and claimed to have his agreement of the 9th of September 1903 specifically enforced against the defendant. The lower appellate Court refused to give effect to the agreement to re-convey on the ground that it was a document compulsorily registrable under section 17, clause (*b*) of the Registration Act. In our opinion, the learned Judge was wrong. Separated entirely from the conveyance of the defendant we can see in this document nothing more than an ordinary agreement to sell, and such agreements are expressly exempted from the operation of section 17, clauses (*a*) and (*b*) of Act III of 1877 by clause (*h*) as it stood in that section and now exception (v). It has been strenuously contended on behalf of the defendant-respondent here, that inasmuch as this agreement to re-convey contains words to the effect that on payment of the consideration the defendant is to give up the land and re-convey, there is a direct interest created by the instrument itself in the land. We think, however, having regard to its form as a whole that it is no more than an *ordinary agreement to re-convey when called* upon to do so, and we are the more disposed to adopt this view since there can be no doubt whatever but that the whole justice of the case is on the side of the plaintiff. We, therefore, think that the decree of the Court below must be reversed and that the plaintiff must now be decreed specific performance of the agreement of the 9th of September 1903, that is to say, that on the plaintiff paying to the defendant Rs. 1,499 within three months of the date of this decree, the defend-

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this resignation a lease for a term of five years was executed and the defendant attorned to the plaintiff in respect of the lands. The defendant's resignation was accompanied by consideration.

After the expiration of the term of the lease, the plaintiff sued to recover possession of the lands and the defendant impugned the plaintiff's title.

Held, dismissing the suit for recovery of possession, that the foundation of the plaintiff's title in 1905 was illegal, that the resignation and lease having been made at the same time and having formed part of what was virtually one transaction, if the transfer which the resignation was held to amount to were tainted with any illegality as being in contravention of the statute law, namely, the Khoti Settlement Act (Bom. Act I of 1880), the letting must go with it, that under section 9 of the said Act the consent of the Khots including the plaintiff was necessary to the validity of the transfer and it was not shown that such consent had been obtained, that accordingly the conditions stated in section 9 being not complied with there was no transfer under that section, nor could the transaction be regarded as a resignation under section 10 of the said Act because it was accompanied by consideration

Held, further, that in the case of a contract where both the parties were *in pari delicto* the plaintiff was not entitled to estop the defendant from showing the illegality of his title, nor was there any estoppel against any Act of Parliament or in India against an Act of the Legislature.

SECOND appeal against the decision of V. G. Kaduskar, Additional First Class Subordinate Judge of Ratnagiri with appellate powers, modifying the decree of J. A. Samant, Subordinate Judge of Chiplun.

The plaintiff sued to recover from the defendant possession of the thikans in suit together with Rs. 93 as arrears of rent for three years and future mesne profits. The plaint alleged that the defendant executed a rent note in plaintiff's favour on the 29th April 1905 and took the thikans for cultivation for a period of five years and that, instead of restoring possession of the same to the plaintiff as agreed in the rent note, the

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But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the khot ; and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector.

defendant wrongfully continued to cultivate the thikans and to receive profits. Hence the suit.

The defendant admitted the rent note sued on and contended that the lands belonged to him and that he passed the rent note because the plaintiff gave him to understand that if he passed the rent note, the plaintiff would fix the rent payable by him once for all.

The Subordinate Judge found that the defendant did not prove that he passed the rent note for getting the rent payable by him as occupancy tenant fixed once for all and not for giving any right to the plaintiff to eject him as an ordinary tenant and in view of the provisions of section 92 of the Evidence Act the defendant could not raise any such contention, that the release relied on by the plaintiff as passed by the defendant was proved and the same was legal and that the plaintiff was entitled to recover possession and Rs 52-2-3 as mesne profits for three years. He, therefore, passed a decree accordingly and directed inquiry into the amount of mesne profits from the date of the suit till delivery of possession to the plaintiff or till the expiration of three years.

On appeal by the defendant the appellate Judge found that the defendant possessed occupancy rights in the lands in suit, that the sale by him of those rights to the plaintiff was not legal and valid and that the transfer relied on by the plaintiff was a sale and not a resignation. The decree of the first Court was therefore modified by rejecting the plaintiff's claim for possession and the defendant was directed to pay only Rs. 62 to the plaintiff.

The plaintiff preferred a second appeal.

D. A. Khare and *P. D. Bhide*, for the appellant (plaintiff):—The document evidencing a transfer in our favour is a deed of release or resignation and is covered

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by section 10 of the Khoti Act. It is worded as a deed of release and the intention of the parties becomes quite apparent thereby.

Assuming that it is, as held by the lower Court, a deed of sale, section 9 of the Khoti Act of 1880 as amended by Act VIII of 1912 makes the khoti lands transferable with the consent of the khot and here the sale-deed passed in plaintiff's favour implies his consent to it. Therefore, the sale deed is valid.

Granting that the sale deed is invalid, the parties to it entered into a contract of tenancy treating the sale as legal and valid and the vendor-defendant admitted the title of the vendee-plaintiff. It is, therefore, not open to the defendant under section 116 of the Evidence Act to turn round and deny plaintiff's title. The defendant is estopped from denying the plaintiff's title. Estoppel by conduct also bars the defendant's contention: *Shyama Charan Bhattacharya* v. *Mokhuda Sundari Debi*[1], *Ayenuddin Nasya* v. *Srish Chandra Banerji*[2], Caspersz on Estoppel, pp. 269-271, Halsbury's Laws of England, Vol. 13, pp. 369, 370.

V. B. Virkar, for respondent (defendant):—We submit that the deed relied on by the plaintiff is not a release or resignation but it is a deed of transfer or sale. Although it is worded as a deed of release or resignation, still, having regard to its substance, it is virtually a deed of sale. Besides, it was accompanied with consideration, therefore, the transaction is a sale under section 54 of the Transfer of Property Act. It has also been held that where a transaction is accompanied with consideration it is a sale: *Ramchandra* v. *Dattatraya*[3], *Badeshah* v. *Narayan*[4]. The Khoti Act,

(1) (1911) 15 Cal W. N. 703.
(2) (1906) 11 Cal W. N. 76.
(3) (1907) 31 Bom. 267
(4) (1907) 9 Bom L R. 829.

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as it was in form before the amendment of 1912, applies to the facts of this case. The deed of sale and the rent note were passed on the 29th April 1905 and they were part and parcel of the same transaction. Section 9 of the Khoti Act as amended by Bombay Act III of 1894 applies. Since the plaintiff has not proved either of the exceptions provided for by section 9 of the Khoti Act, the transfer of the occupancy land by the defendant, who is an occupancy tenant, to the plaintiff, who is one of the khoti sharers, is void and inoperative: *Badeshah v Narayan*[1], *Mahadev v. Mahadaji*[2]. The contract contained in the sale deed is therefore void. The consent of the khot does not make the transfer of the khoti lands valid unless and until either of the two exceptions provided for by section 9 is proved

Assuming that the consent of the khot makes the transfer valid independently of the exceptions in section 9 of the amended Khoti Act of 1904, the transfer of the lands is void for want of the consent of the khot. The consent of the plaintiff alone is not sufficient because under section 3, clause (2) of the Khoti Act the term "khot" includes "all co-sharers in a khotki". The plaintiff is not the only khot of the village. There are other khoti sharers who, along with the plaintiff, hold the village in joint possession. Those khoti sharers must be shown to have consented to the transfer, and that is not done.

The doctrine of estoppel cannot apply. Both the documents were executed between the same parties and at one and the same time They were one transaction. Therefore if the sale deed falls, the rent note also must fall with it. Section 116 of the Evidence Act is, therefore, not applicable.

[1] (1907) 9 Bom L R 829 [2] (1911) 13 Bom. L. R. 1157.

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Khare, in reply.

BEAMAN, J.:—In this suit the defendant purported to resign his occupancy rights in a Khotki to the plaintiff, who was one of the Khots, in the year 1905. Synchronously with this resignation a lease for a term of five years was executed, and the defendant attorned to the plaintiff in respect of these lands. It is found as a fact that the proposed resignation was accompanied by consideration. After the expiration of the term the plaintiff has sued the defendant upon the lease, and the question of greatest difficulty which has arisen in the appeal is, whether the defendant is entitled to impugn the plaintiff's title?

We pass over the nice point whether the estoppel mentioned in section 116 of the Evidence Act survives the term upon which the lands may have been demised. This difficulty would arise upon a construction of the words "during the continuance of the tenancy". We think it unnecessary to give any decision upon that point, because we entertain no doubt but that the defendant is not estopped from challenging the legality of the plaintiff's title. There is no estoppel against an Act of Parliament or in this country against an Act of the Legislature. It is to be remembered that the transfer or resignation and the lease were made at the same time and formed parts of what is virtually one transaction. If the transfer is found to be tainted with any illegality as being in contravention of any provision of the Statute law the letting must go with it. We entertain no doubts in the state of the authorities but that this alleged resignation must be now regarded as a transfer. That has already been decided in more than one case in this Court, and must be regarded as settled law. Then, if a transfer, it could only be legal under section 9 of the Khoti Act, provided that the conditions set forth in that section have been complied with. The

essential condition which we have to consider is whether the consent of the Khot was obtained, for it is not alleged that this transfer could be validated on the ground of any custom proved, authorising a tenant so to alienate his occupancy rights without the consent of the Khot. It is not seriously contended that the consent of the Khot within the full meaning of that term has been obtained. One Khot, the man in whose favour the void resignation was made, has of course consented. It is admitted that there are other Khots whose consent would also be necessary, and it is not suggested that that consent has been obtained. In these circumstances there could be no transfer under section 9. That section expressly makes occupancy rights of this kind non-transferable unless the conditions stated in the section have been complied with; nor, as we said, in the state of authorities could it be regarded as a resignation under section 10 since it was accompanied by consideration. Therefore the foundation of the plaintiff's title in 1905 is shown to have been illegal. It was, moreover, a contract between the plaintiff and the defendant here, so that both parties may be said to have been *in pari delicto*, and the plaintiff is not entitled to estop the defendant from showing the illegality of the title so founded. We must, therefore, confirm the decree of the Court below and dismiss this appeal with all costs upon the appellant.

Appeal dismissed.

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Khare, in reply.

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and they had a right to cut them, that they disputed the number of trees alleged to have been cut and the amount of damages, and that they were paying only a fixed rent and were not liable to pay anything extra for the trees.

The Subordinate Judge found that the defendants were permanent tenants and were entitled to the trees which they had cut and that they were not liable to pay separate rent for the fruit-bearing trees over and above the rent they paid for the lands. The suit was accordingly dismissed

The plaintiff appealed and the District Judge confirmed the decree.

The plaintiff preferred a second appeal.

Jayakar, with *P. D. Bhide*, for the appellant (plaintiff) :—The defendants are tenants and as such they have no right to cut trees. The plaintiff is the owner of the soil and on the principle of the maxim *quid quid plantatur solo solo cedit* the landlord is the owner of the trees. According to the ruling in *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal*[1] property in trees is by a general rule of law vested in the proprietor of the land unless a contrary custom is proved. The onus of proving custom is on the tenant and no such custom is alleged by them or proved.

The ruling in *Imdad Khatun* v. *Bhagirath*[2] is to the effect that even though the trees are planted by the tenant, he cannot transfer them.

Coyaji, with *B. V. Desai*, for respondents 1, 3 and 6 (defendants 1, 3 and 6) :—It is found that the defendants are permanent tenants and that the trees have been planted by them. In the case of permanent tenants the

(1) (1894) 22 Cal 742 (2) (1888) 10 All 159

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landlord is entitled to rent only and the tenants have a right to cut trees. At any rate the tenants have a right to cut trees under section 108, clause (*h*) of the Transfer of Property Act.

The cases relied on were decided under the local Acts. They are therefore not applicable.

BEAMAN, J. :—The only question argued before us is whether the defendants, who are found to be permanent tenants, have a right to cut trees upon the lands demised. The plaintiff is found to be the owner of the lands, but the tenants upon the principle stated in section 83 of the Land Revenue Code are found to be permanent tenants, that is to say, the origin of their tenancy is lost in antiquity. The dispute between the plaintiff and the defendants now centres upon the right of the defendants to cut down trees which, *ex concesis* and by the admission of the plaintiff, they have themselves planted. In these circumstances we entertain no doubt whatever but that the defendants have the right which they claim. The English law of fixtures and the principle upon which it is based have no general applicability in this country. Therefore, before the passing of the Transfer of Property Act, which deals expressly with circumstances like these, we must be referred, in the absence of any special usage, to what we conceive to be principles of equity, justice and good conscience, and none of those in our judgment compel us to say that a permanent tenant who has planted trees upon his lands is precluded from cutting down and making use of them. It is unnecessary to discuss the numerous cases to which we have been referred, since the principle of our judgment is very simple, very clear, and has since found Legislative sanction in section 108, clause (*h*) of the Transfer of Property Act. It has been contended that that section does not apply to agricul-

tural leases, and we are not supposing that it does, but we do think that the principles to which it gives expression are principles which, for the most part, were good law in respect of the facts covered by them before they found Legislative expression in the Transfer of Property Act, and among such would certainly be the principle upon which we found our decision here. We think, therefore, that the decree of the lower appellate Court must be confirmed and this appeal dismissed with all costs.

Decree confirmed.

G. B. R.

CRIMINAL REFERENCE.

Before Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR v. VINAYAK NARAYAN ARTE.*

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July 7.

Criminal Procedure Code (Act V of 1898), section 349—Trying Magistrate sending up a case to the Sub-Divisional Magistrate on the ground that he cannot pass adequate sentence—Sub-Divisional Magistrate sending up the case to another Magistrate—Committal of the case by such Magistrate to Court of Session—Commitment not valid—Practice and Procedure.

A Magistrate of the Second Class trying a case sent up the case to the Sub-Divisional Magistrate on the ground that he could not pass an adequate sentence. The latter transferred the case to a Magistrate of the First Class, who committed it to the Court of Session. A question having arisen if the commitment was legal:

Held, quashing the commitment, that under section 349 of the Criminal Procedure Code (Act V of 1898) it was the Sub-Divisional Magistrate alone who was competent to deal with the case.

THIS was a reference made by K. B. Wassoodew, Additional Sessions Judge of Thana.

* Criminal Reference No. 31 of 1914.

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The accused was tried in the first instance by the Second Class Magistrate of Pen for offences punishable under sections 336 and 452 of the Indian Penal Code. The Magistrate found the accused guilty; but he was of opinion that he could not pass a sufficiently severe sentence against the accused. He, therefore, sent up the proceedings to the Sub-Divisional Magistrate, Kolaba Northern Division, under section 349 of the Criminal Procedure Code. The latter transferred the case to the First Class Magistrate for disposal, who committed the case to the Court of Session at Thana.

The Additional Sessions Judge of Thana, being of opinion that the commitment was illegal, referred the case to the High Court, observing as follows :—

I humbly submit that the order of transfer made by the Sub-Divisional Magistrate, Kolaba, N D., is illegal and the proceedings of the committing Magistrate are therefore void The Second Class Magistrate, who first enquired into this case, submitted his proceedings to the Sub-Divisional Magistrate under section 349, Criminal Procedure Code. Section 349 (*2*) makes it obligatory on the Sub-Divisional Magistrate to pass "such judgment, sentence, or order in the case as he thinks fit" In this case the Sub-Divisional Magistrate has neither passed judgment nor sentence. He has made an order of transfer to a Magistrate subordinate to him under section 528, Criminal Procedure Code It is submitted, that the order of transfer is not such an order as is contemplated by section 349 (*2*), Criminal Procedure Code. The word 'order' in this section necessarily implies a "final order." The order of transfer is not a final order. It only directs a Subordinate Magistrate to enquire into the case The fact that the words "judgment and sentence" precede and are associated with the word "order" implies that the word "order" is used *ejusdem generis* with the words "judgment and sentence." I am, therefore, of opinion that the Sub-Divisional Magistrate had no power to transfer the case sent up to him under section 349, Criminal Procedure Code.

The committing Magistrate apparently observed the above difficulty and therefore referred the case to the District Magistrate. The latter in his memo (page 9 of Book No. 3) has expressed an opinion that the Sub-Divisional Magistrate's order was not irregular. Presumably the District Magistrate was under the impression that a Sub-Divisional Magistrate had general powers of transfer under section 528, Criminal Procedure Code. It is submitted that section 528, Criminal Procedure Code, does authorise a Sub-Divisional Magistrate,

The order of transfer being bad, all proceedings before the First Class Magistrate, inclusive of the order of commitment, are bad.

S. S. Patkar, Government Pleader, for the Crown:— The order of transfer by the Sub-Divisional Magistrate is not bad, because section 349 empowers him to pass any order which he thinks fit and which is according to law. He can exercise the powers of transfer given to him by section 192.

The proceedings before the First Class Magistrate are not void because he has not passed any sentence within the meaning of section 530, clause (1). He has simply committed the case to the Court of Session, which is within his ordinary powers.

SHAH, J.:—The facts that have given rise to this reference are briefly these: the accused was in the first instance tried by a Second Class Magistrate for offences punishable under sections 336 and 452, Indian Penal Code. He sent up the proceedings under section 349 of the Criminal Procedure Code to the Sub-Divisional Magistrate, Kolaba, Northern Division, as he thought that he could not pass a sentence sufficiently severe against the accused. The Sub-Divisional Magistrate, instead of disposing of the matter himself, transferred the case to a First Class Magistrate, and the First Class Magistrate committed the accused to the Court of Session. The Additional Sessions Judge of Thana has made this reference, pointing out that in his opinion the commitment by the First Class Magistrate is illegal.

Having regard to the special character of the provisions of section 349 I am of opinion that it is only the District Magistrate or the Sub-Divisional Magistrate who has jurisdiction to exercise the powers mentioned in paragraph 2 of section 349, *i. e.*, to pass such judgment, sentence or order in the case as he thinks fit. The

Sub-Divisional Magistrate in this case has apparently acted under section 528 of the Criminal Procedure Code, which, in my opinion, has no application to proceedings submitted to him by a Second Class Magistrate under section 349; and in the argument before us it is not suggested that the powers of transfer under section 528 could justify the transfer of the proceedings to the First Class Magistrate in this case.

Having regard to the powers of a First Class Magistrate and of a Sub-Divisional Magistrate as specified in Schedule III and to section 530, clause (l) of the Code, I feel fortified in the view I take of the section that the jurisdiction to deal with the proceedings under section 349 is conferred upon District Magistrates and Sub-Divisional Magistrates and upon no other Magistrates. Even assuming that the Sub-Divisional Magistrate had the power to transfer these proceedings to the First Class Magistrate, he could not transfer the jurisdiction which was conferred upon him by the section and not upon the First Class Magistrate. It seems to me that this is not a question of the power of the Sub-Divisional Magistrate to transfer any proceedings before him but a question of jurisdiction.

The Government Pleader has sought to support the order of commitment by relying upon section 532, Criminal Procedure Code. But it is quite clear that the section has no application to the facts of this case, in which the proceedings are supposed to be wholly without jurisdiction. I think, therefore, that the *proceedings before the First Class Magistrate are without* jurisdiction. The result is that the order of commitment is set aside and the proceedings are sent back to the Sub-Divisional Magistrate, to whom they were, in the first instance, submitted by the Second Class Magistrate under section 349, to be disposed

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of by him according to law. We are indebted to Mr. Manubhai for having argued the reference on behalf of the accused at our request.

HEATON, J.:—I concur. I do not feel any doubt now (at one time I did) that section 349 confers special powers, or, what may be called, a special jurisdiction, and confers it only on District and Sub-Divisional Magistrates. That being so, every case which is referred under section 349 must be disposed of by a Magistrate who has that special jurisdiction. In this particular case the matter was disposed of by a Magistrate who had not this jurisdiction, and I concur in the proposed order.

Order set aside.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1914. *July 29*

SIDDAPPA BIN BAPU BIRADUR AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 3), APPELLANTS, v. NINGANGAVDA BIN SIDDANGAVDA AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 2), RESPONDENTS.*

Hindu law—Adoption—Adoption made by widow of predeceased son—Contemporaneous consent of her mother-in-law in whom estate vested as heir.

Under Hindu Law, the widow of a predeceased son can make a valid adoption with the contemporaneous consent of her mother-in-law in whom the estate of the last full owner is vested as an heir.

Payapa v. Appanna(1), followed.

SECOND appeal from the decision of F. K. Boyd, District Judge of Bijapur, confirming the decree passed by V. R. Kulkarni, Subordinate Judge at Muddebihal.

Suit for declaration that certain lands belonged to the plaintiff.

* Second Appeal No. 103 of 1913.

(1) (1898) 23 Bom. 327

The lands in dispute belonged originally to Ramangavda, who died in 1877 leaving him surviving his widow Avabai, and Shidava, the widow of his predeceased son. In 1878, Shidava adopted Shidappa with the consent of Avabai. Both Avabai and Shidava died about the year 1904.

On Shidappa's death, his widow adopted the plaintiff in 1906. The defendants, who were the reversionary heirs of Ramangavda, claimed the lands.

The plaintiff sued in 1908 for a declaration that the lands belonged to him. The defendants contended *inter alia* that Shidappa's adoption was invalid.

The Subordinate Judge granted the declaration sought holding that the adoption was valid on the following grounds:—

The question is whether the consent of this Avabai will make the adoption valid which was otherwise invalid. In my former judgment I have relied upon *Payapa* v. *Appanna*[1], and have held that the adoption in question was valid under the peculiar circumstances of the present case. The facts of the present case are on all fours with the facts of the ruling *Payapa* v. *Appanna*[1] quoted above. The defendants rely upon some subsequent rulings, viz., *Venkappa Bapu* v. *Jivaji Krishna*[2], *Ramkrishna* v. *Shamrao*[3], *Anandibai* v. *Kashibai*[4] and *Datto Govind* v. *Pandurang Vinayak*[5], and urge that the ruling *Payapa* v. *Appanna*[1] is no longer good law and that therefore the adoption of Shidappa by Shidava in 1878 was invalid under Hindu Law. After carefully going through the rulings quoted by the defendants I find that the ruling I rely upon (*Payapa* v. *Appanna*[1]) has not been overruled or even dissented from. All that the subsequent rulings say is that certain propositions laid down in the ruling in question were rather too general and that same therefore cannot be accepted as a safe guide in determining all possible points of law which arise when the adoption in dispute is by a female not the widow of the last holder. It was held in *Payapa* v. *Appanna*[1] that the adoption by a daughter-in-law with the assent of the mother-in-law (in whom the estate was vested on the death of the last holder) was valid under Hindu Law. This proposition of law has not been

(1) (1898) 23 Bom. 327.
(2) (1900) 25 Bom. 306.
(3) (1902) 26 Bom. 526.
(4) (1904) 28 Bom. 461.
(5) (1908) 32 Bom. 499.

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overruled, dissented from or even doubted in any of the recent rulings. Hence I think that the ruling *Payapa* v. *Appanna*(1) is still good law and relying upon the same I hold that the adoption of Shidappa by Shidava in 1878 was valid under Hindu Law.

On appeal, this decree was confirmed by the District Judge on the following grounds :—

The only point in appeal is whether this adoption was valid. As Ningangavda predeceased his father, Shidava was not the widow of the last male holder. That *status* was held by Avabai. Shidava was, therefore, not competent to adopt and the issue is thus narrowed to the question whether the assent of Avabai validates the adoption.

The learned Sub-Judge has found this question in the affirmative, relying on *Payapa* v. *Appanna*(1), a finding in which I concur.

It is admitted for appellants, and it is perfectly clear, that the present case is exactly parallel to that of *Payapa* v. *Appanna*. It is, however, contended that that ruling can no longer be held good law, having been doubted in *Datto Govind* v. *Pandurang Vinayak*.(2). Reference was also made to an article by Mr. Justice Candy at pages 1-19 of Volume IX of the Bom. L. R. Journal and to various other rulings not directly in point.

Now, in my opinion, *Datto's case* is easily distinguishable from the present case, and of course the article I have quoted, though entitled to the greatest respect, is not authoritative. The only question, so far as this Court is concerned, is whether *Datto* v. *Pandurang*(2) (the only case in which there is any hint even of doubt) actually overrules *Payapa* v. *Appanna*(1). There can be no doubt that it does not. I have, therefore, only to follow the latter ruling, and I do so with a humble expression of my agreement with it.

The defendants Nos. 1 and 3 appealed to the High Court.

Nilkantha Atmaram, for the appellant :—The adoption of Shidappa is invalid because it is not to the last full owner Ramangavda. The case of *Payapa* v. *Appanna*(1) is against my contention ; but the *ratio* of the case is inconsistent with *Rámkrishna* v. *Shamrao*(3) and *Datto Govind* v. *Pandurang Vinayak*(2). The question as to the validity of an adoption must be determined by the capacity of the adopting widow

(1) (1898) 23 Bom. 327. (2) (1908) 32 Bom. 499.
(3) (1902) 26 Bom. 526.

herself, and if that capacity is wanting in her, no amount of consent by others can make good what was intrinsically invalid.

Setlur, with *P. D. Bhide*, for respondent No. 1 (plaintiff).—The ruling in *Payapa's case*[1] is entirely unaffected by what was said in subsequent cases. The decision is in complete accord with the Hindu sentiment and ought not to be interfered with at this distance of time.

C. A. V.

SHAH, J. :—The facts out of which this Second Appeal arises are few and undisputed. One Ramangavda had a son Ningangavda, who died during his life-time leaving a widow Shidava. Thereafter Ramangavda died leaving a widow Avabai, who inherited the property of her husband. In 1878 Shidava adopted Shidappa with the consent of Avabai in whom the estate was vested at the time as the heir of the last full owner. Shidava died in 1904. Avabai apparently had predeceased Shidava. The present plaintiff who is the adopted son of Shidappa claims to be the owner of the property in suit, while the defendants claim the property as the reversioners of Ramangavda. It is common ground that the plaintiff is entitled to succeed, if the adoption of Shidappa by Shidava is valid. The lower Courts have held the adoption to be valid mainly relying upon the case of *Payapa* v. *Appanna*[1].

In the appeal before us the same question has been raised, and it is argued on behalf of the defendants that the adoption by Shidava is invalid as the adoption is not to the last full owner, and that the consent of Avabai cannot validate it. In other words it is contended that the case of *Payapa* v. *Appanna*[1] which is admittedly on all fours with the present case is not correctly decided. It

(1) (1898) 23 Bom. 327.

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is conceded—and I think rightly conceded—that there is no decision of this Court or of the Privy Council which is in conflict with *Payapa's* case. But Mr. Nilkanth has relied upon certain dicta in (1) *Shri Dharnidhar* v. *Chinto*[1]; (2) *Ramchandra* v. *Mulji Nanabhai*[2]; (3) *Ramkrishna* v. *Shamrao*[3]; and (4) *Datto Govind* v. *Pandurang Vinayak*[4], as showing that the decision in *Payapa's* case cannot now be accepted as a binding authority. He has also drawn our attention to the criticism on these cases in paragraphs 194 and 195 of Mayne's Hindu Law (8th Edn.), pp. 255-258.

In dealing with these cases it is necessary to bear in mind the particular facts of each case, and the point for decision with reference to which the observations must be deemed to have been made. It is also necessary to remember that a case is only an authority for what it actually decides, and that it cannot be quoted for a proposition which may seem to follow logically from it. Viewed in this light it is clear that *Payapa's* case is an authority for the proposition that a widowed daughter-in-law (I mean the widow of a predeceased son) can make a valid adoption with the contemporaneous consent of her mother-in-law, in whom the estate of the last full owner is vested as an heir. We are not concerned in this case with the exact scope of the general propositions enunciated in the case as third and fourth exceptions to the rule by Ranade J. The observations in the two earlier cases were *obiter dicta* and considered by the Court which decided *Payapa's* case. The Full Bench ruling in *Ramkrishna* v. *Shamrao*[3] does not touch the point actually decided in *Payapa's* case. The Full Bench considered the question of the power of the grandmother to make a valid adoption and held that her power

(1) (1895) 20 Bom. 250 at p. 258.
(2) (1896) 22 Bom. 558.
(3) (1902) 26 Bom. 526.
(4) (1908) 32 Bom. 499.

to adopt was at an end, when her son died leaving a grandson as his heir.

The considerations, which would apply to the limited propositions with which we are concerned in this appeal and with which the learned Judges in *Payapa's* case were concerned, would be quite different, and so far as I can see there is nothing in the Full Bench case, which is in conflict with the main ground of *Payapa's* decision. The same may be said of the case of *Datto Govind* v. *Pandurang Vinayak*[1], in which as I read the observations of Chaubal, J., it was merely suggested that the general propositions stated as the third and fourth exceptions to the ordinary rule were not universally true and could not apply to certain widows adopting under certain conditions. In any case I see nothing in these two cases which is in conflict with the decision in *Payapa's* case. On a careful consideration of the arguments urged by Mr. Nilkanth, I am unable to see any reason to dissent from the decision in *Payapa's* case.

I consider it essential that a rule affecting the devolution of property after it is laid down definitely and clearly should not be lightly disturbed unless there are clear and cogent reasons to do so. *Payapa's* case was decided in 1898. Mr Justice Ranade then observed as follows :—"Nothing is more common in this country than to find parents, when they grow old, and have the misfortune of losing an only son in their old age, leaving a young widow behind, think it their duty to console that widow for the loss she has suffered by permitting her to adopt a son in preference to adopting a son themselves." To adopt any other view now would have the effect of unsettling many titles settled on the footing of *Payapa's* case. I would, therefore, follow the decision in *Payapa's* case.

Apart altogether from *Payapa's* case, I see nothing in such an adoption as we have in this case, which is

(1) (1908) 32 Bom. 499.

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is conceded—and I think rightly conceded—that there is no decision of this Court or of the Privy Council which is in conflict with *Payapa's* case. But Mr. Nilkanth has relied upon certain dicta in (1) *Shri Dharnidhar* v. *Chinto*[1]; (2) *Ramchandra* v. *Mulji Nanabhai*[2]; (3) *Ramkrishna* v. *Shamrao*[3]; and (4) *Datto Govind* v. *Pandurang Vinayak*[4], as showing that the decision in *Payapa's* case cannot now be accepted as a binding authority. He has also drawn our attention to the criticism on these cases in paragraphs 194 and 195 of Mayne's Hindu Law (8th Edn.), pp. 255-258.

In dealing with these cases it is necessary to bear in mind the particular facts of each case, and the point for decision with reference to which the observations must be deemed to have been made. It is also necessary to remember that a case is only an authority for what it actually decides, and that it cannot be quoted for a proposition which may seem to follow logically from it. Viewed in this light it is clear that *Payapa's* case is an authority for the proposition that a widowed daughter-in-law (I mean the widow of a predeceased son) can make a valid adoption with the contemporaneous consent of her mother-in-law, in whom the estate of the last full owner is vested as an heir. We are not concerned in this case with the exact scope of the general propositions enunciated in the case as third and fourth exceptions to the rule by Ranade J. The observations in the two earlier cases were *obiter dicta* and considered by the Court which decided *Payapa's* case. The Full Bench ruling in *Ramkrishna* v. *Shamrao*[3] does not touch the point actually decided in *Payapa's* case. The Full Bench considered the question of the power of the grandmother to make a valid adoption and held that her power

[1] (1895) 20 Bom. 250 at p. 258.
[2] (1896) 22 Bom. 558.
[3] (1902) 26 Bom. 526.
[4] (1908) 32 Bom. 499.

to adopt was at an end, when her son died leaving a grandson as his heir. 1914

The considerations, which would apply to the limited propositions with which we are concerned in this appeal and with which the learned Judges in *Payapa's* case were concerned, would be quite different, and so far as I can see there is nothing in the Full Bench case, which is in conflict with the main ground of *Payapa's* decision. The same may be said of the case of *Dattu Govind* v. *Pandurang Vinayak*[1], in which as I read the observations of Chaubal, J., it was merely suggested that the general propositions stated as the third and fourth exceptions to the ordinary rule were not universally true and could not apply to certain widows adopting under certain conditions. In any case I see nothing in these two cases which is in conflict with the decision in *Payapa's* case. On a careful consideration of the arguments urged by Mr. Nilkanth, I am unable to see any reason to dissent from the decision in *Payapa's* case.

I consider it essential that a rule affecting the devolution of property after it is laid down definitely and clearly should not be lightly disturbed unless there are clear and cogent reasons to do so. *Payapa's* case was decided in 1898. Mr. Justice Ranade then observed as follows :—"Nothing is more common in this country than to find parents, when they grow old, and have the misfortune of losing an only son in their old age, leaving a young widow behind, think it their duty to console that widow for the loss she has suffered by permitting her to adopt a son in preference to adopting a son themselves." To adopt any other view now would have the effect of unsettling many titles settled on the footing of *Payapa's* case. I would, therefore, follow the decision in *Payapa's* case.

Apart altogether from *Payapa's* case, I see nothing in such an adoption as we have in this case, which is

(1) (1908) 32 Bom. 499

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opposed to the Hindu sentiment or Hindu usage or any *specific and inflexible rule of Hindu Law.* In this case Avabai was unquestionably competent to adopt to Ramangavda at the time when she consented to Shidappa's adoption by Shidava and to defeat the rights of the reversioners. Instead of following that method of doing so, she allowed her daughter-in-law to do so by giving her consent to the adoption at the time. It matters nothing to the reversioners whether their rights are defeated by the adopted son of the last full owner or of a predeceased son of the last full owner. The rule as to the adoption being to the last full owner for the purposes of inheritance is subject to certain exceptions. For instance a mother is allowed to adopt, though her adoption is not to the last full owner, so as to enable the adopted son to inherit the property of her son. An exception in favour of the widow of a predeceased son when she adopts with the contemporaneous consent of her mother-in-law seems to be just and in accordance with Hindu Law. The result, therefore, is that the decree of the lower appellate Court is confirmed with costs.

HEATON, J.:—I concur. I do not wish to express any opinion at all on the general principles which were discussed and which it is far from easy to determine, but I am quite satisfied that in this case we should decide as was done in *Payapa's* case.

Decree confirmed.

R. R.